

# **The World Trade Organization**

A Developing Country Perspective on the Law and Practice of  
Negotiations, Decision-Making, and Patent Protection on  
Pharmaceuticals

Candidate Number: 129

Deadline: 15.01.2007

Advisor: Yue Liu

Word count: 30162

(H-06)

12.01.2007



# Contents

<b>ABBREVIATIONS .....</b>	<b>1</b>
<b>INTRODUCTION .....</b>	<b>3</b>
 <b><u>1    <u>DECISION-MAKING AND NEGOTIATIONS IN THE WTO</u></u>.....</b>	<b><u>16</u></b>
 <b>1.1    Introduction .....</b>	<b>16</b>
 <b>1.2    Decision-Making in the WTO.....</b>	<b>18</b>
1.2.1    The Decision-Making Bodies .....	18
1.2.2    The Principle of Consensus Decision-Making .....	20
1.2.3    Rules on Decision-Making in the WTO .....	21
1.2.4    Implications .....	24
 <b>1.3    Rules, Principles and Procedures in WTO Negotiations .....</b>	<b>27</b>
1.3.1    The Preparatory Process .....	28
1.3.2    Transparency .....	30
1.3.3    Participation.....	36
1.3.4    Single Undertaking and Cross-Issue Linkage.....	37
1.3.5    Special and Differential Treatment.....	41
 <b>1.4    Informal Consultations: Legitimate Bargaining or Democratic Deficit? .....</b>	<b>43</b>
1.4.1    Experiences from GATT .....	44
1.4.2    Green Room Consultations.....	45
1.4.3    Implications of Informal Consultations .....	48
 <b>1.5    Improvements and Alternatives.....</b>	<b>51</b>
1.5.1    Responsibility for Procedural Issues.....	52
1.5.2    The Sutherland Report.....	53
1.5.3    Multilateral versus Plurilateral Approach.....	56
1.5.4    Consensus versus Voting.....	59
1.5.5    Improvements to the Consensus Process .....	61
 <b>1.6    Conclusion .....</b>	<b>63</b>

<b><u>2</u></b>	<b><u>CASE: THE TRIPS AGREEMENT AND PATENT PROTECTION ON</u></b>	
	<b><u>PHARMACEUTICALS.....</u></b>	<b><u>66</u></b>
<b>2.1</b>	<b>Introduction .....</b>	<b>66</b>
2.1.1	The Concept of Intellectual Property .....	66
2.1.2	Intellectual Property in International Trade .....	68
2.1.3	Counterfeit Drugs .....	69
2.1.4	Access to Medicines in Developing Countries .....	69
<b>2.2</b>	<b>TRIPs and Patent Protection on Pharmaceuticals .....</b>	<b>72</b>
2.2.1	Deadlines for Implementation of TRIPs Obligations.....	72
2.2.2	TRIPs Provisions on Patent Protection .....	73
2.2.3	Compulsory Licencing.....	75
2.2.4	Import under Compulsory Licencing .....	76
2.2.5	Parallel Import .....	76
<b>2.3</b>	<b>The Declaration on the TRIPs Agreement and Public Health .....</b>	<b>77</b>
2.3.1	The Legal Status of the Declaration.....	79
2.3.2	Implications of the Declaration.....	80
<b>2.4</b>	<b>The Paragraph 6 Issue .....</b>	<b>82</b>
2.4.1	The 2002 Deadlock.....	83
2.4.2	The Interim Waiver.....	85
2.4.3	The Amendment of the TRIPs Agreement .....	88
<b>2.5</b>	<b>Conclusion .....</b>	<b>90</b>
	<b><u>CONCLUSION.....</u></b>	<b><u>92</u></b>
	<b><u>LITERATURE.....</u></b>	<b><u>95</u></b>

## Abbreviations

APEC	Asia-Pacific Economic Cooperation
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System of Preferences
GWP	Gross World Product
ICJ	International Court of Justice
IGO	Inter-Governmental Organization
IMF	International Monetary Fund
IP	Intellectual Property
ITO	International Trade Organization
LDC	Least Developed Countries
MFN	Most favored nation
MSF	Médecins Sans Frontières
NGO	Non-Governmental Organization
SDT	Special and differential treatment
TNC	Trade Negotiations Committee
TPRB	Trade Policy Review Body
TRIMs	Trade-Related Investment Measures
TRIPs	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	UN Conference on Trade and Development
WTO	World Trade Organization



# Introduction

## 1 Background

### 1.1 WTO Negotiations

The issue of the WTO decision-making process became subject to academic and political debate after the failure of the third Ministerial Conference in Seattle in 1999. The Conference was intended to launch a new round of negotiations to follow the Uruguay Round (1986-1994) that established the WTO, and set the scope and modalities of the round. However, the Conference was paralyzed by a fundamental lack of preparation and procedures, and proved the imperative of such for the success of WTO negotiations. According to a number of developing countries, the General Council Chairman was unwilling to properly include the concerns of developing countries in the draft.<sup>1</sup> As a result, there was no agreed draft text when the conference started. Allegedly, the Conference was never formally opened or closed,<sup>2</sup> and the fact that the Chairman of the Conference also was the main US trade negotiator – Charlene Barshefsky, led to massive criticism from developing countries.<sup>3</sup> Further, informal consultations which have a long tradition from the predecessor GATT, excluded developing country participation, and were dismissed as undemocratic.<sup>4</sup>

The Conference was unable to launch a new round, and the membership could not reach agreement on a Ministerial Declaration.<sup>5</sup> The preparation process proved unable to respond to the concerns of the growing group of developing countries, and there was a north-south divide regarding the agenda, in particular inclusion of new issues, e.g. the Clinton administration's labor proposal.<sup>6</sup> After the Seattle failure, the Director-General of the WTO widely blamed the “medieval” organizational culture.<sup>7</sup> Martin Khor, chairman of the G77

---

<sup>1</sup> WTO Documents WT/GC/W. *Preparations for the 1999 Ministerial Conference*.

<sup>2</sup> Raghavan, Chakravarthi: *The WTO – an 'unruly' rule-based organization?* paragraph 10

<sup>3</sup> Aslam, Abid: *Developing countries assail WTO 'dictatorship'*, paragraph 2

<sup>4</sup> Ibid

<sup>5</sup> WTO Press/160: *It is vital to maintain and consolidate what has already been achieved*.

<sup>6</sup> Foreign Policy in Focus: *WTO Trade & Labor Standards*. Vol. 5 No. 15.

<sup>7</sup> Lamy, Pascal: *Leadership, the EU and the WTO*, last paragraph

group of developing countries, blamed the non-transparent and undemocratic nature of the WTO system, which makes it possible for major powers to manipulate the system, and the refusal of many developing countries to continue to be on the receiving end.<sup>8</sup>

Recommendations brought forward included formal establishment of the “Green Room” informal meetings, and guidelines for procedures at Ministerial Conferences.<sup>9</sup> However, a large part of the negotiation and decision-making processes of the WTO remain informal.

## 1.2 The TRIPs Agreement and Access to Pharmaceuticals

The socioeconomic development of many developing countries is disabled by the burden of wide-spread infectious diseases. In 2001, HIV/AIDS, tuberculosis and malaria claimed 5.7 million lives.<sup>10</sup> Only 10 percent of the people infected with HIV/AIDS in Africa have access to treatment.<sup>11</sup>

There are a number of reasons for the lack of access to medicines. High prices caused by the temporary monopoly-situation that patent protection provides, is one of them. The Doha Declaration on TRIPs and Public Health states that the TRIPs Agreement “does not and should not prevent Members from taking measures to protect public health ..., in particular, to promote access to medicines for all”.<sup>12</sup> Developing countries and NGOs criticize the TRIPs Agreement for giving priority to private patent holders over public health, and argue that the current mechanisms provided for in the TRIPs Agreement that allow members to attend to public health needs are far from sufficient.<sup>13</sup>

This issue was addressed by the Doha Declaration on TRIPs and Public Health of 2001, followed up by a temporary waiver<sup>14</sup> and a subsequent amendment of the TRIPs

---

<sup>8</sup> Kohr, Martin: *Seattle reports*, paragraph 11

<sup>9</sup> UN: *WTO impasse in Seattle Spotlights inequities of global trading system*.

<sup>10</sup> WHO (2002): *Scaling up the Response to Infectious Diseases: A Way Out of Poverty*.

<sup>11</sup> Pan American Health Organization (2005): *More Progress on Drug Prices*. Paragraph 7.

<sup>12</sup> WTO Document WT/MIN(01)/DEC/2

<sup>13</sup> Joint NGO Statement on the Special Discussion in the WTO TRIPS Council on Patents and Access to Affordable Medicines. *Patents and Medicines: The WTO Must Act Now!*

<sup>14</sup> WTO Document WT/L/540



Agreement in 2005.<sup>15</sup> Developing countries and NGOs claim, however, that the measures set out are not operational in accordance with the stated intentions, and inadequate to remedy the vast public health problems of the developing world.<sup>16</sup>

### 1.3 Main Features of the WTO

Although it was not on the agenda when the Uruguay Round opened in 1987, the round concluded with the establishment of the WTO. Unlike its predecessor GATT, which operated on a provisional basis, the WTO has an institutional structure and is a legal person.<sup>17</sup> The WTO is a member-driven organization; all positions are held by representatives from the member-countries, except about 635 administrative positions in the secretariat. In comparison, the World Bank has some 10,000 employees.<sup>18</sup> The most striking difference to the GATT system, however, is the establishment of an effective dispute mechanism. Under GATT, the losing party to a dispute could block adoption of the decision.<sup>19</sup> The judicial and effective enforcement capability of the Dispute Settlement Body ensures the legally binding character of the WTO rules and agreements. Many of the rules and procedures for negotiations and decision-making are, however, codification of GATT practices.<sup>20</sup>

The main functions of the WTO are to be a forum for continued trade negotiations, to administer the huge mass of treaty-law, provide effective rules for multilateral interaction, and to resolve trade disputes through the Dispute Settlement Body.<sup>21</sup> Other functions are to monitor national trade policies of the members, provide technical assistance etc. to developing countries, and cooperate with other international organizations.<sup>22</sup>

---

<sup>15</sup> WTO Document WT/L/641

<sup>16</sup> MSF: *MSF calls on WTO to refuse 'paragraph 6' change.*

<sup>17</sup> Article 8 of the WTO Agreement

<sup>18</sup> World Bank: *About Us*

<sup>19</sup> Article XXIII of GATT 1947

<sup>20</sup> E.g. decision-making, see Article IX (1) of the WTO Agreement. A general provision on the continuation of GATT practices is provided for in Article XVI (1)

<sup>21</sup> The Dispute Settlement Body is established by the Dispute Settlement Understanding Article 2, Annex 2 to the WTO Agreement

<sup>22</sup> WTO: *What is the WTO?*

At present, the WTO has 149 members,<sup>23</sup> which account for about 95 percent of world trade.<sup>24</sup> The WTO represents fundamental changes in scope and power compared to its predecessor. It has an extensive mandate and authority. The multilateral approach requires that all agreements apply to all members (except for the plurilateral agreements in Annex 4).<sup>25</sup> Further, the Single Undertaking approach, which was introduced in the Uruguay Round and continued under the WTO, requires all members to accept a package of negotiated agreements. It is not possible to commit to some agreements only, or to make reservations, which is a very common mechanism in international law: “nothing is agreed until everything is agreed”. This is in striking contrast to the system that evolved under the GATT, which employed the voluntary, plurilateral approach.

Moreover, the issues covered have expanded far beyond traditional trade issues. The main endeavor is no longer reduction of tariff and non-tariff barriers, but covers a variety of areas from intellectual property and services, to investment and government procurement. The WTO rules and agreements also extend to areas that traditionally have been subject to domestic regulation, and limit the policy-options of national law and policy-makers. As a consequence, WTO regulation has an impact on health policy, environment, food security etc. The WTO has hence a direct impact on societies and citizens, which has resulted in increasing public awareness of the organization’s activities. The violent protests at the Seattle Ministerial Conference in 1999 is an illustration of this tendency.

#### 1.4 Developing Countries in the WTO

Developing countries form a majority of the WTO Membership (73 percent).<sup>26</sup>

The share of developing countries’ trade, however, about 28 percent, has been almost unchanged from 1980 to 2000.<sup>27</sup> The strong and rule-based Dispute Settlement Body is

---

<sup>23</sup> WTO: *Members and Observers*

<sup>24</sup> WTO (2004): *International Business Conference on Global Economic Governance & Challenges of Multilateralism*, paragraph 3

<sup>25</sup> Preamble to the WTO Agreement paragraph 4

<sup>26</sup> WTO: *Members and Observers*

<sup>27</sup> The World Trade Organization: *Law, Practice and Policy* (2003) p. 454

beneficial to developing countries, in that the outcome of a dispute does not reflect power-imbalances of the parties to the dispute to the extent that diplomatic solutions tend to.

Developing countries have traditionally pursued economic development through import substitution policies.<sup>28</sup> The import substitution policies of Latin-American countries in the 1970's and 80's turned out to be highly unsuccessful, and culminated in an economic crisis in the 1980's.<sup>29</sup> A number of Asian countries on the other hand, adopted liberal trade policies in the same period, and attained a free market success with its rapid adjustment to industrial production and open markets.

Distribution of wealth is imperative when engaging in market liberalization. An increase in Gross World Product (GWP) does not necessarily entail improved living standards for the poor, as the growth caused by trade liberalization often predominately benefits the countries with a high level of development. Experiences from trade liberalization have shown that the main beneficiaries also among developing countries are predominately the largest and most industrialized.<sup>30</sup> This also applies domestically: About three-fourths of those living in extreme poverty worldwide live in rural areas.<sup>31</sup> This part of the population usually takes little part in a country's overall growth.<sup>32</sup> This questions the ability of (free) trade to work for the poor, and is one of the fundamental criticisms of the current multilateral trading system.<sup>33</sup>

This illustrates the need for careful adaption to a market economy, and awareness of the broader implications of such adaption. These are often not sufficiently evaluated before obligations on liberalization are committed and far-reaching domestic reforms are set out. International institutions governing economic relations to poor countries, the WTO in particular, have a tremendous responsibility in this regard.

---

<sup>28</sup> Policies that subsidize domestic production to avoid importation.

<sup>29</sup> Narlikar, Amrita (2005): *The World Trade Organization: A Very Short Introduction*, p. 23

<sup>30</sup> WTO: *Trade liberalization statistics*.

<sup>31</sup> World Bank (2006): *World Development Indicators*.

<sup>32</sup> Ibid

<sup>33</sup> See e.g. Finance & Development: *Making Globalization Work for the Poor*. Vol. 39, No. 1

Developing countries differ greatly in the degree to which their economies are integrated in the international trading system; a few large developing countries have attained enormous progress and growth, while many still trade in a few primary commodities.<sup>34</sup> Market access for these commodities is therefore particularly important for their ability to attain economic growth.

The dilemma developing countries faced in the Uruguay Round because of the Single Undertaking,<sup>35</sup> was either to agree to the entire negotiated package, or surrender all opportunities gained in the negotiations. Most developing countries accepted it, and became full members of the WTO. In return for the inclusion of new issues such as services and intellectual property, put on the table by a number of developed nations, developing countries were granted inclusion of agriculture and textiles. However, the benefits promised developing countries in this bargain have subsequently been claimed to be highly illusional, as well as the balance in obligations and benefits between developed and developing countries being fundamentally unfair.<sup>36</sup>

The WTO has been widely criticized for the “one size fits all” approach.<sup>37</sup> The statement of the Indian delegation to the WTO in the 1950s is often quoted in this relation: “Equality of treatment is equitable only among equals. A weakling cannot carry the burden of a giant”.<sup>38</sup> In other words, developing countries claim the necessity of special treatment and non-reciprocity adapted to their level of development. They claim the right to protect new industries that are not yet ready to compete on the international level - the so-called infant industry argument, and argue that all developed countries used protective measures in their early stages of economic development.<sup>39</sup>

---

<sup>34</sup> IMF (2006): *Unblocking Trade*.

<sup>35</sup> Requires all members to accept a package of negotiated agreements: “nothing is agreed until everything is agreed”, here through the signing of the Marrakesh Agreement.

<sup>36</sup> Stiglitz, Joseph (2005): *Fair Trade for All*, pp. 46-47

<sup>37</sup> UNCTAD (2005): *Lessons of Experience: Trade and Development Board Hears that One-Size-Fits-All Approach Doesn't Work*.

<sup>38</sup> Narlikar, Amrita (2005): *The World Trade Organization: A Very Short Introduction*, p. 29

<sup>39</sup> Oxfam (2005): *Positions in the trade debate*, p. 2

## **2 Motivation and Purpose**

The many deadlocks and failures that have characterized the negotiations of the WTO since its establishment in 1995 call into question whether the current procedures on negotiations and decision-making are adequate. The lack of efficiency of WTO law-making have contributed to a proliferation of bilateral and regional trade agreements that might undermine the WTO and the multilateral trade cooperation in the long run. This tendency may also work against the poorest countries, as they lack the negotiating power to preserve their basic interests or even enter into such arrangements. The unequal bargaining power may deepen the gap between developed and developing countries in such arrangements compared to cooperation through the WTO.<sup>40</sup>

Further, many developing countries have been largely unsatisfied with how the negotiations are structured in the WTO, e.g. in relation to the Seattle Ministerial Conference. This leads to a set of questions: Is WTO negotiations and decision-making *de facto* transparent and predictable? Moreover, does the WTO have democratic legitimacy? Identifying key problems of the current rules and practices and possible improvements that could make the WTO more democratic, efficient, and fair should hence be addressed.

My main reason for choosing to write about the WTO and developing countries is, in addition to the crucial importance of the issues, my plan to pursue a career within the field of international affairs and multilateral trade. Writing a thesis on the WTO and developing countries is a good starting point. To write the thesis in English was a natural choice, considering that all legal sources and available literature are in English, and in addition improving my English skills. I hope my limited attainments have not weakened the clarity of this paper substantially.

## **3 Content, Structure and Methodology**

This paper aims to present some of the challenges and difficulties that developing countries face in their participation in the multilateral trading system of the WTO. It seeks to identify

---

<sup>40</sup> These were among the conclusions of the UNESCAP report concerning bilateral proliferation in Asia. See *2005 Economic and Social Survey of Asia and the Pacific*, UN Economic and Social Commission for Asia and the Pacific (UNESCAP), April 25, 2005

the primary reasons for these problems, and put forward suggestions for improvement of inadequacies in the current legal framework and practices.

The main research question is: *Are developing countries adequately regarded in the WTO framework and practices of negotiations and decision-making?* The hypothesis is that developing countries are not sufficiently regarded in the rules and procedures of the WTO, and hence not in specific negotiated agreements.

The paper will therefore first focus on the institutional framework and practices governing decision-making and negotiations. It will then analyze how possible shortcomings have influenced the TRIPs Agreement and access to medicines to illustrate how the rules and procedures for making and amending trade rules can affect a specific area of trade.

The paper is hence divided into two parts:

The first part on decision-making and negotiations begins with an account of the rules and practices governing decision-making in the WTO. It then focuses on the rules and principles of the negotiations, and the role of informal consultations and procedures; how they might affect the balance of power among the parties to the negotiations, in particular between developed and developing countries. Finally, alternatives and improvements to the current system are discussed, arguing that an institutional reform is currently not likely to gain sufficient support, but that substantial improvements are possible within the existing legal framework. The central argument in this part is that there is a lack of rules and guidelines governing negotiations which may exacerbate power-imbalances among the members, but that some degree of flexibility is necessary to achieve consensus and to secure the participation of major traders.

The second part on the TRIPs Agreement and access to medicines begins with an account of the rules on patent protection concerning medicines, and exceptions that give members the right to waive their obligations on certain terms. Simultaneously, it discusses how these rules are interpreted and applied. Then, recent negotiations, reforms and amendments and their implications are examined, highlighting the main legal problems *de lege lata* that may limit the possibility for developing countries' to take public health considerations, due to

their TRIPs obligations. This discussion aims to illustrate how the power-imbalances described in the first section have influenced the rights and obligations on patent protection and access to medicines. It argues that powerful countries with interests in strong intellectual property protection may abuse their negotiating power due the flexible approach, resulting in disregard for basic public health needs of many developing countries, as well as for commitments made in the Doha Declaration on TRIPs and Public Health.

Hence, this paper contains not only discussions on the existing trade rules and how they are applied – the *de lege lata* approach, but also how the rules and practices of the WTO could and should be amended to provide a sufficient foundation for future negotiations and decision-making – the *de lege ferenda* approach.

The discussion on negotiations and decision-making focus primarily on procedures in Ministerial Conferences, while the processes in the General Council and subordinate WTO bodies is left out. Many of the same rules and procedures, however, also apply to these bodies. Negotiation-alliances are not discussed due to its characteristics of political science. The discussion on the TRIPs Agreement and access to medicines will only focus on the rules and procedures that are relevant for access to medicines. Broader implications of the intellectual property protection standards set out in the TRIPs Agreement will not be addressed.

#### **4 Literature**

The sources used for this thesis are publications by the WTO, as well as by independent authors, academics and organizations. The literature is predominately by academic authors, but also some from civil society critics and journalists. The WTO website is quite comprehensive, including sources of law, minutes of negotiations, reports from the WTO and independent organizations etc.

The Journal of International Economic Law has articles on the subject in almost every issue of great academic quality which have provided valuable background material on the issues. Relevant research papers and other publications by leading academic institutions in the

area, such as John F. Kennedy School of Government at Harvard University, Center for Research on Economic Development and Policy Reform at Stanford University, and Faculty of Law at Maastricht University, have contributed with ideas on the approach and structure of the analysis.

Finally, reports from Inter-Governmental Organizations such as the World Health Organization (WHO) and the United Nations (UN), and Non-Governmental Organizations such as Médecins Sans Frontières (MSF), Oxfam, Third World Network, and Consumer Project on Technology (CPTech) have provided both statistical material and legal analysis of great value. In addition, the NGOs often provide a more critical view than the WTO itself, and have been used to create a balanced picture of the issues at hand.

## **5 Clarifications**

### **5.1 The Perspective of this Thesis**

As this is a master thesis in law, the perspective is primarily legal. However, a distinctive side of the WTO law is that it is intimately associated with economics and political economy. The analysis will not solely address the legal dimensions of the WTO, but also political and economic aspects and implications will be discussed. It aims, however, to address the mentioned aspects separately.

### **5.2 The term “developing countries”**

The term “developing countries” is vague, and is used differently depending on the context. The term is not defined in any WTO Agreement, nor by the UN. There is a lack of consensus both internationally and within the WTO to the terms on which a country is to be considered a “developing country”.<sup>41</sup> Developing country status is hence not given automatically, but has to be claimed. It is often a matter of negotiation between the claimer and countries affected. At the end of the Uruguay Round of negotiations, the US and the EU declared that they would not consider certain countries developing countries.<sup>42</sup>

---

<sup>41</sup> WTO: *Who are the developing countries in the WTO?*

<sup>42</sup> Wikipedia: *Developing countries*



Least developed countries (LDCs) are a sub-group of developing countries defined by the United Nations Conference on Trade and Development (UNCTAD).<sup>43</sup> The LDCs are countries that meet the following three criteria: (1) Low income (the gross national income (GNI) per capita is less than \$750 for addition to the list, above \$900 for graduation); (2) Weak human assets; and (3) Economic vulnerability.<sup>44</sup> The list of LDCs currently contains 50 countries.<sup>45</sup>

## **6 Sources of Law**

Here follows a brief account of the primary sources of law in WTO law, and the main legal foundation for the analysis of this thesis.

The Statute of the International Court of Justice (ICJ Statute) Article 38 is generally recognized as a definitive statement of the sources of international law.<sup>46</sup> The principles of Article 38 are hence not limited to how the ICJ uses the sources of law in dispute resolution, but has validity in most disciplines of international law, including the law of the WTO. There is no equivalent to the ICJ Article 38 in any WTO agreement, but the principles are brought into WTO law by the Dispute Settlement Understanding (DSU): Article 3 (2) provides that the purpose of dispute settlement is to clarify the provisions of the WTO Agreements “in accordance with customary rules of interpretation of public international law”. The Vienna Convention on the Law of Treaties is largely a codification of customary international law, and its rules and principles are hence valid in WTO law.

### **6.1 The Covered Agreements**

In accordance with the Vienna Convention Article 31 (2) and Article 38 (1)(a) of the ICJ Statute, the fundamental source of law in the WTO is the text of the WTO agreements. This is also provided for in Article 7 of the DSU, which states that the panels shall “examine, in

---

<sup>43</sup> The United Nations Conference on Trade and Development was established in 1964, and promotes integration of developing countries into the world economy, e.g. by providing technical assistance to developing countries.

<sup>44</sup> UNCTAD: *UN recognition of the LDCs*.

<sup>45</sup> UNCTAD: *UN list of LDCs after the 2003 triennial review*.

<sup>46</sup> Wikipedia: *Sources of International Law*.

the light of the relevant provisions in [the covered agreements cited by the parties to the dispute] the matter referred to the DSB” and to “address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute”. The WTO Agreement is an umbrella agreement: Article 7 of the DSU refers to “covered agreements”, which means all agreements annexed to the WTO Agreement.

## 6.2 Panel Reports

After the WTO agreements, reports of GATT panels, WTO panels, and the Appellate Body are the second most important source of law. The system of precedent of the ICJ is duplicated in the WTO.<sup>47</sup> According to the ICJ Statute Article 38 (1)(d), judicial decisions are a subsidiary source of law. In addition, Article 59 confines the binding force of decisions of the Court in subsequent cases: “The decision of the Court has no binding force except between the parties and in respect of that particular case.” The purpose of this provision is to clarify the distance to the system of precedent in Anglo-American law. The Court is hence not legally obligated to follow prior decisions, but can and should consider them. The ICJ rarely departs from previous decisions. Adopted DSB reports often have a strong persuasive power: They are not binding precedent, but are assumed to be followed in subsequent cases.

Unadopted panel reports are relevant, but have less weight than adopted reports. In the case of Japan – Alcoholic Beverages, the Appellate Body agreed with the Panel Report that unadopted panel reports “have no legal status in the GATT or WTO system” but that “a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant”.<sup>48</sup>

## 6.3 Other Sources

All subparagraphs of Articles 31 and 32 of the Vienna Convention and Article 38 (1) ICJ Statute outline potentially relevant sources in WTO law. In addition to the covered agreements and dispute settlement reports, this includes among others the teachings of

---

<sup>47</sup> The World Trade Organization: Law, Practice, and Policy (2003), p. 56

<sup>48</sup> Japan - Alcoholic Beverages, AB-1996-2, Section E

highly qualified publicists, general principles of law, and other international instruments. These sources are sometimes referred to in WTO dispute settlement.

#### 6.4 The Primary Legal Foundation for this Thesis

The legal core for the discussion on decision-making is Articles IX and X of the WTO Agreement. The procedures of the Ministerial Conference and the General Council have customary practices that deviate from the written rules. Further, the Rules of Procedure established by the General Council, and the Ministerial Declarations for each Round and Conference outline rules and principles that govern negotiations and decision-making.

The legal starting point regarding patent protection is the TRIPs Agreement Articles 27 through 34. The legal core regarding access to medicines is the exceptions provided for in Article 31. A number of panel reports and Appellate Body reports address issues relevant to patent protection on pharmaceuticals. A key decision is *Canada – Pharmaceutical patents*.<sup>49</sup> The Doha Declaration provides an interpretive baseline for the interpretation of the provisions on patent protection in relation to access to medicines. Further, the temporary waiver adopted in 2003 affect the members' rights to waive TRIPs obligations on patent protection.<sup>50</sup> Finally, the amendment adopted on December 6, 2005<sup>51</sup> amends Article 31 of the TRIPs Agreement, and will replace the 2003 waiver when acceptance by the membership in accordance with Article X (3) of the WTO Agreement is achieved.

---

<sup>49</sup> WTO Document WT/DS114

<sup>50</sup> WTO Document WT/L/540

<sup>51</sup> WTO Document WT/L/641

# 1 Decision-Making and Negotiations in the WTO

## 1.1 Introduction

Legal systems consist of three main processes: (1) law-making, (2) dispute settlement based upon the law, and (3) enforcement of the dispute settlement decisions. In national legal systems, the government has supreme authority to exercise power within its territory, and law-making, dispute settlement and enforcement are hence usually provided for with quite effective mechanisms. In an international context, these processes are difficult due to the principle of sovereignty. International law-making is confined to the willingness of sovereign nation states to bind their exclusive authority. International rule-making is hence generally less effective than domestic. Binding dispute settlement and enforcement in international law can only be exercised to the extent the states have committed themselves to binding arbitration. Far-reaching reservations are therefore common.

An example is the jurisdiction of the International Court of Justice (ICJ). According to Article 93 of the UN Charter, all members of the UN are automatically parties to the Statute of the ICJ. Being party to the Statute, however, does not give the court jurisdiction in relation to those countries. The jurisdiction is based on consent, with four types of jurisdiction outlined in Article 36 of the Statute. The USA withdrew from the compulsory jurisdiction of the court in 1986.<sup>52</sup> The Court's jurisdiction is hence accepted on a case by case basis in disputes involving the US. If the parties in a dispute have accepted the court's jurisdiction, and fail "to perform the obligations incumbent upon it under a judgment rendered by the Court", the Security Council may be called upon to "make recommendations or decide upon measures" if the Security Council considers such actions necessary [Article 94 of the UN Charter]. However, the Security Council has shown

---

<sup>52</sup> Wikipedia: *International Court of Justice*.

unwillingness to enforce the Court's decisions, e.g. in Nicaragua vs. the United States. The US withdrew from the compulsory jurisdiction of the court the same year as the judgement.

The making and enforcement of international law is hence dominated by politics and diplomacy, and is largely cumbersome and ineffective. Ambiguity, far-reaching reservations, and weak enforcement mechanisms legitimize the question of whether the term "hard law" is appropriate.

The WTO largely departs from these characteristics. The WTO is characterized by legalism through its dispute settlement mechanism, and is hence largely different than its predecessor GATT. The Dispute Settlement Body (DSB) of the WTO has exclusive<sup>53</sup> and compulsory<sup>54</sup> jurisdiction, which strengthens the predictability and legally binding nature of WTO agreements. Further, if the losing party fails to comply with a decision, enforcement through cross-issue retaliation is provided for.<sup>55</sup> Economic sanctions can be set out to punish violators in other sectors of trade than the one subject to the dispute, which facilitate compliance. The DSB is unique and uncomparable to other international dispute settlement systems, and, in this area, WTO law is a contribution to public international law.

However, the political processes of the WTO are largely informal and GATT-derived, and fit the above description of international law. Under the GATT, with its provisional nature, limited membership, and occupation largely limited to reduce tariff and non-tariff barriers, these customary processes worked quite well. The needs and challenges of the WTO in terms of law and policy-making are quite different. The membership ranges from the poorest LDCs to advanced western economies, and the interests are hence extremely diverse. Further, the issues addressed through the WTO range from agriculture to intellectual property and government procurement.

---

<sup>53</sup> Article 23 of the DSU

<sup>54</sup> The DSU is Annex 2 of the WTO Agreement, and is therefore binding for all members as a part of the single undertaking [paragraph 2 of Article II of the WTO Agreement]. Article 6 provides that the request of a member to establish a panel shall be complied with unless there is consensus not to do so.

<sup>55</sup> Article 22 of the DSU

The increasing diversity in membership, complexities in issues, and the legally binding character of the obligations have not been accompanied by development of appropriate decision-making and negotiation procedures. This effectively restrains the democratic legitimacy and efficiency of the WTO. The political processes of the WTO are hence not adapted to the vast changes of the multilateral trading system since GATT. As commented above, the lack of efficiency also leads to a proliferation of non-multilateral trade cooperation that could further disadvantage developing countries.<sup>56</sup> The gap in effectiveness and legitimacy between the political processes and the judicial dispute settlement system creates an imbalance that should be addressed.

The first part of the chapter focuses on the rules on decision-making, while the second addresses the negotiation principles and procedures. Further, informal consultations, including the so-called “Green Room” meetings that are used to achieve consensus, and the power-implications of such informal processes are discussed. Finally, alternatives and improvements to the current system are addressed.

## **1.2 Decision-Making in the WTO**

Decision-making relates to how a decision is arrived at in Ministerial Conferences, in the General Council, and subordinate bodies and the dispute settlement system. Although the main focus in this thesis is the decision-making procedures of the Ministerial Conference, the same rules and procedures largely apply also to other WTO bodies.

### **1.2.1 The Decision-Making Bodies**

The Ministerial Conference is the supreme authority of the WTO, and the topmost decision-making body.<sup>57</sup> It meets biennially – “at least once every two years” [Article IV (1) of the WTO Agreement], gathering trade-ministers from all member countries.

---

<sup>56</sup> UNESCAP: *2005 Economic and Social Survey of Asia and the Pacific*, April 25, 2005

<sup>57</sup> WTO: *Ministerial Conferences*.

Everyday operations are conducted by the General Council. It is the highest decision-making body after the Ministerial Conference. It shall consist of representatives of all the member countries, and meets “as appropriate” [Article IV (2)], in practice approximately once a month. Between the Ministerial Conferences, its functions shall be conducted by the General Council, and carry out the functions assigned to it in the WTO Agreement [Article IV (2)]. This includes among others cooperation with other intergovernmental organizations (IGOs) and non-governmental organizations (NGOs) [Article V], and budget approval [Article VII (1)].

The General Council also meets as the Dispute Settlement Body (DSB) [Article IV (3)], and the Trade Policy Review Body (TPRB) [Article IV (4)]. The Dispute Settlement Body decides the outcome of disputes on the recommendation of a dispute panel or, if appealed, the Appellate Body. According to Annex 3 paragraph C(ii) of the WTO Agreement, the TPRB shall carry out periodic assessment of the trade policies and practices of the member countries.

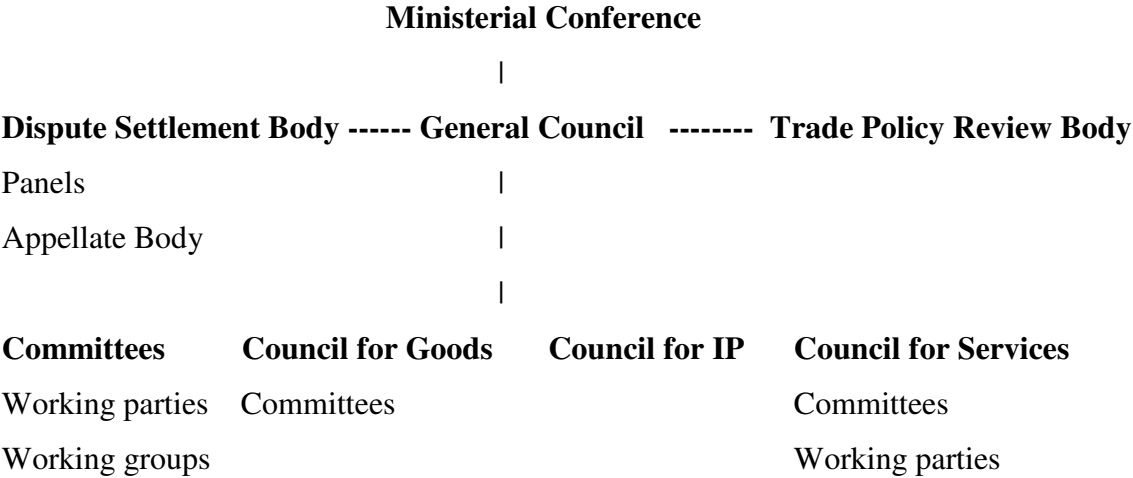
The head of the General Council is the Director-General, who is responsible for supervising the administrative functions of the WTO [Article VI]. It is a powerful position: The Director-General is central as agenda-setter and mediator in negotiations. The importance of this position was illustrated by the leadership struggle at the Seattle Ministerial Conference in 1999.<sup>58</sup>

The WTO Agreement establishes three Councils: Council for Trade in Goods, Council for Trade in Services, and Council for Trade-Related Aspects of Intellectual Property Rights. [Article IV (5)]. These Councils shall oversee the functioning of related agreements, and have the authority to establish committees and subsidiary bodies as required [Article IV (6)]. In accordance with Article IV (7), the Ministerial Conference has also established Committees.

---

<sup>58</sup> WTO Document PRESS/131: *WTO member governments agree on Director-General succession.*

The three levels of decision-making bodies in the WTO:



Source: WTO

### 1.2.2 The Principle of Consensus Decision-Making

It is important to distinguish consensus from unanimity. Unanimity means complete agreement by everyone. Consensus decision-making does not only imply the agreement of the participants, but also relates to the process of reaching such agreement.<sup>59</sup> The consensus process involves addressing key concerns, also those of the minorities, as each member in principle has veto power. This results in greater consideration of the objections of the oppositional parties than what is normally the case in voting, where the concerns of the outvoted parties do not have to be considered. However, unless the minority has any serious objections to the proposal, it will normally not block the decision.

Consensus decision-making may lead to group polarization, which implies that group discussions may lead some members to engage in a position further away from the collective compromise.<sup>60</sup> This could entail a greater risk of not being able to achieve consensus, or that the compromise-balance in the decision is decentralized.

<sup>59</sup> Wikipedia: *Consensus decision-making*.

<sup>60</sup> Isenberg, Daniel J. (1986): *Group Polarization: A Critical Review and Meta-analysis*.



Consensus decision-making is generally regarded as having greater democratic legitimacy than majority decisions.<sup>61</sup> Nevertheless, the democratic abilities of consensus largely depend on how the process is regulated and governed.

The consensus process can be ineffective, as a small fraction or even one member of the decision-making group dissenting, may block a decision. The generally least conciliating members may as a result be able to achieve compromises that are closer to their wishes, especially if the importance or potential gains of reaching a decision are high. This is the negative and undemocratic side of the consensus model. To which degree such blocking and compromise-displacement is possible, depends on differences in power of the parties involved and how the process is governed.

The consensus process is naturally very time-consuming, in particular if there are many parties with different interests involved, which necessitate the negotiation of far-reaching compromises.

### 1.2.3 Rules on Decision-Making in the WTO

The rules on decision-making are provided for in Articles IX and X of the WTO Agreement. The procedures and customary practices that evolved under GATT 1947 are largely continued in the WTO.<sup>62</sup> Article IX (1) of the WTO Agreement provides that “[t]he WTO shall continue the practice of decision-making by consensus followed under GATT 1947”. The decision-making in the WTO is hence dominated by the practice of consensus. A decision is arrived at when “no Member, present at the meeting when the decision is taken, formally objects to the proposed decision” [Footnote 1 of the WTO Agreement]. Members not in favor of the proposed decision must hence file a formal objection at the time of the consensus decision to withhold it.

---

<sup>61</sup> See e.g. P. Van den Bossche, *The Law and Policy of the World Trade Organization* p. 148, and the Sutherland Report p. 63

<sup>62</sup> Article XVI (1) of the WTO Agreement

Note that only objections from members present in the decision-making meeting can block the decision. This is one of the important distinctions to unanimity, as unanimity requires consent from *all* members. Unanimity is required for amendment of some core WTO provisions, see below.

Consensus is not the only way of reaching a decision, according to the WTO Agreement: “Where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting” [Article IX (1)]. The normal procedure for decisions by voting at Ministerial Conferences and in the General Council is simple majority of the votes cast, with one vote per member [Article IX (1)]. This is unless otherwise is provided in the WTO Agreement or any specific relevant agreement.

Exceptions from the simple majority rule are provided for important decisions such as waivers, where three fourths majority is required if consensus is not reached within 90 days [Article IX (3)], and accession, where two-thirds majority of the members is required [Article XII (2)]. Procedures for decisions on matters related to requests for waivers or accessions to the WTO under Articles IX or XII of the WTO Agreement were adopted by the General Council on November 15, 1995.<sup>63</sup>

Adoption of so-called “authoritative interpretations” in accordance with Article IX (2) does not require attempts to reach consensus: Such decisions are taken by a three-fourths majority of the members. Note that for these exceptions, the majority is calculated from all members, not only the votes cast.

According to the rules on decision-making, if consensus cannot be achieved, voting is generally the secondary way of reaching a decision in the Ministerial Conference, the General Council, and subordinate WTO bodies. An exception is the procedure of the Dispute Settlement Body (DSB), where decisions shall only be reached by consensus, i.e. not secondary voting [Article 2 (4)], except when so-called “negative” or “reverse”

---

<sup>63</sup> Decision-Making Procedures under Articles IX and XII of the WTO Agreement, agreed by the General Council on November 15, 1995, WTO Document WT/L/93

consensus is provided for. Reverse consensus is provided for key decisions on such as the establishment of a panel and adoption of a panel report or Appellate Body report: A decision is taken unless the DSB decides by consensus *not* to establish the panel or adopt the report [Articles 6 (1), 16 (4) and 17 (4) of the Dispute Settlement Understanding<sup>64</sup>].

Specific voting rules are set out in the Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council.<sup>65</sup> Subordinate bodies of the WTO such as councils and committees shall in accordance with Rule 33 of the respective Rules of Procedure<sup>66</sup> refer the matter to the General Council if decision cannot be reached by consensus.

Decision-making rules regarding amendment are provided for in Article X of the WTO Agreement. The general rule is; if consensus cannot be reached within 90 days after the proposal has been formally tabled at the Ministerial Conference, it shall decide whether to submit the amendment for acceptance by two-thirds majority: the two-thirds must ratify the amendment for it to become effective. In some cases, consent by all members (unanimity) is required for amendment. This applies to amendment of Articles IX and X of the WTO Agreement (decision-making and amendment), MFN treatment rules (Article I of GATT 1994, Article II (1) of GATS and Article 4 of the TRIPs Agreement) and obligations on tariff schedules etc. in Article II of GATT 1994 [Article X (2) of the WTO Agreement].

Until now, no amendments have been made to any multilateral trade agreement in Annex 1A to the WTO Agreement, which include all WTO agreements except GATS, TRIPS, DSU, TPRB and the plurilateral agreements. The first time a core WTO Agreement will be amended, is through the December 6 Decision<sup>67</sup> (2005) on amendment of the TRIPs

---

<sup>64</sup> Annex 2 to the WTO Agreement

<sup>65</sup> WTO: *Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council*, July 25, 1996, WTO Document WT/L/161, hereafter “Rules of Procedure”

<sup>66</sup> E.g. Rules of Procedure for Meetings of the Trade Policy Review Body, October 10, 2005, WTO Document WT/TPR/6/Rev.1

<sup>67</sup> WTO Document WT/L/540: *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health - Decision of 30 August 2003*.

Agreement in Annex 1C to the WTO Agreement. This decision amends Article 31 of the TRIPs Agreement to allow export of pharmaceuticals produced under a compulsory license. See more about this amendment in chapter 2.5.

According to Article X (9) of the WTO Agreement, plurilateral agreements can be added to Annex 4 of the WTO Agreement, including it in the WTO body of agreements. The decision to adopt such an agreement can exclusively be done by consensus on the Ministerial Conference. This rule could make plurilateral agreements difficult to adopt. The plurilateral approach implies that countries can choose to agree to new rules and agreements on a voluntary basis. All members are hence not required to be parties to the agreement such as the system is with the multilateral approach, which implies common agreements among all members. The plurilateral practice evolved under GATT, but was largely left as a negotiation strategy in the Uruguay Round and subsequent rounds due to the Single Undertaking approach and the aim to conclude all agreements multilaterally.

No plurilateral agreements have been added under Article X (9), nor have there been any amendments to plurilateral agreements under their respective Articles of amendment. The International Bovine Meat Agreement and the International Dairy Agreement, two of the four plurilateral agreements in annex 4 of the WTO Agreement, were deleted under Article X (9).<sup>68</sup>

#### 1.2.4 Implications

As described above, the advantage of the consensus model is that it encourages efforts to find the most widely acceptable solution and thereby minimize objection. This is particularly important in international law, as all signatories have to ratify new international agreements after the adoption in order to be bound. It has to be “expressly recognized by the contesting states”, as expressed in the ICJ Statute Article 38 (1)(a). Article 9 (2) of the Vienna Convention on the Law of Treaties provides that adoption of a treaty on international conference by two-thirds of the states present and voting, unless another rule

---

<sup>68</sup> WTO Documents IMA/8 and IDA/8, September 30, 1997

is decided by the same majority. The consensus model, however, further facilitates the ratification process; if decisions on the adoption of new rules were made by majority of vote, it would decrease the likelihood that the countries outvoted subsequently will ratify the agreement. A consensus decision is hence more likely to be ratified after adoption. This is an important function of the consensus practice in the WTO.

The decision-making rules of the WTO are in striking contrast to decision-making procedures of comparable inter-governmental institutions such as the World Bank and IMF. The decision-making system of these institutions is based on weighted voting. The votes are weighted by the financial strength and contributions of the members, a so-called “one dollar, one vote” system. The general rule is simple majority of the votes cast [Section 3 of Article 5 of the IBRD Articles of Agreement]. As of November 1, 2004, the United States hold 16.4 percent of the votes in the World Bank.<sup>69</sup> Major decisions require 85 percent of the votes,<sup>70</sup> and the US has consequently in effect veto power in such decisions. This system effectively places the control of the institutions in the hands of large industrialized countries.

Note that the majority of vote is calculated from the votes cast, and not from all members of the WTO. Members not present or not voting will hence not be counted. Also note the formulation used in relation to voting: if consensus cannot be achieved, the issue “shall be decided by voting”. From a common linguistic understanding, “shall” implies mandatory voting if a decision cannot be arrived at by consensus.

The one member, one vote rule set out in Article IX (1) of the WTO Agreement in combination with the simple majority requirement in most issues, considerable voting power is given developing countries, as they make up almost three-fourths of the WTO membership.<sup>71</sup> Their votes can in theory influence the agenda and outcome of trade negotiations substantially. In practice, however, when consensus cannot be achieved, the prescribed secondary voting is not employed. The rules on decision-making in the WTO

---

<sup>69</sup> Wikipedia: *The World Bank*.

<sup>70</sup> E.g. amendment of the Articles of Agreement [Article VIII (a) of the Agreement]

<sup>71</sup> WTO: *Members and Observers*

Agreement are hence interpreted in a manner that consensus is the only way of arriving at a decision in the WTO. If consensus can not be achieved, no decision is taken.<sup>72</sup>

One implication of the exclusive practice of consensus is that developing countries' power in WTO decision-making is restrained, compared to the system set out in the WTO Agreement. They are not able to make use of their strength in numbers, and the apparently democratic principle of one member, one vote set out in Article IX is hence in most cases without actual substance.

The practice of consensus increases the legitimacy of the decision-making process, as the minority cannot be outvoted and hence be forced to accept decisions. As mentioned above, consensus facilitates ratification. The efficiency of WTO decision-making is, however, confined by the practice, as it is very sensitive to deadlocks. Legitimacy and efficiency are hence largely opposite considerations where an increase in one may lead to a decrease of the other.

Consensus does not necessarily mean that all members are in favor of the decision, only that no member finds the decision so unacceptable that they must block it. Having the opportunity to use the "veto" does hence not mean that it can be exercised freely and without consequences. As the members are not equal in power and influence, they do not have the same ability to maintain a veto.<sup>73</sup>

Although the absence of voting disadvantages developing countries in comparison to the model set out in the WTO Agreement, the consensus decision-making model itself does not disfavor weak parties. As described above, in principle the consensus process involves addressing key concerns of all members due to their possibility of blocking decisions. However, the ability of the consensus process to include less powerful members' interests largely depends on how the processes that lead to the consensus decision are governed. The processes prior to the decision will hence have to be examined.

---

<sup>72</sup> Foreign Policy in Focus (2002): *WTO In Focus: What's This Organization (WTO)*.

<sup>73</sup> Ehlermann and Ehling (2005): *Decision-Making in the World Trade Organization*. *Journal of International Economic Law* 8(1), p. 50

### **1.3 Rules, Principles and Procedures in WTO Negotiations**

The globalization of trade creates a need for international law-making. The WTO, as the largest and most authoritative international institution governing multilateral trade issues, is the natural forum for making and enforcing multilateral trade rules. As pointed out in the introduction, the WTO law-making processes are cumbersome, and do not match the judicial dispute settlement system. As the range of issues and the binding effect of the rules increase within the WTO, so does the demand for predictability.

The processes by which the members discuss, debate, and negotiate issues, are distinct from the consensus process to adopt decisions. The negotiation processes by which the members arrive at the point where they are asked to adopt a decision, is the subject of this chapter. The way in which issues are negotiated is, however, largely influenced by the consensus model.

The procedures for negotiations are largely GATT derived. Article 16 (1) of the WTO Agreement provides that “[e]xcept as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947”.

General guidelines governing Ministerial Conferences was established on July 25, 1996, the Rules of Procedure. The principles that each round is founded upon are set out in the Ministerial Declaration of the Ministerial Conference opening the Round. The GATT/WTO Ministerial Declaration on the Uruguay Round<sup>74</sup> was adopted on September 20, 1986.<sup>75</sup> Part 1 Section B of the Declaration outlines “General Principles Governing Negotiations”. The fourth Ministerial Conference in Doha, Qatar in 2001 opened the Doha Round of negotiations, which is still not concluded. The principles of the Doha negotiations are set out in paragraphs 47-52 of the Declaration.

---

<sup>74</sup> WTO Document MIN(86)/W/19/Corr.1

<sup>75</sup> WTO Document MIN.DEC/Chair

The Trade Negotiations Committee (TNC) was established by paragraph 46 of the Doha Declaration, and operates under the authority of the General Council. According to Article 46, “[t]he overall conduct of the negotiations shall be supervised by a Trade Negotiations Committee”. Further, the TNC “shall establish appropriate negotiating mechanisms as required and supervise the progress of the negotiations”. It shall hence establish subsidiary bodies to conduct negotiations on specific issues. The Director-General serves as Chairman *ex officio* throughout the negotiations. The Trade Negotiations Committee established two new negotiating groups to deal with market access and WTO rules (anti-dumping, subsidies, regional trade agreements) respectively. The other issues are to be negotiated in existing Councils and Committees.<sup>76</sup>

The principles outlined for both the Uruguay Round and the Doha Round are largely corresponding. These principles are in short transparency, participation, single undertaking, across the table, and special and differential treatment to developing countries. This chapter will focus on the principles of the Doha Round and comment on how these have been practiced in negotiations. Before discussing these principles, the preparatory process of Ministerial Conferences will be outlined.

### 1.3.1 The Preparatory Process

As a starting point for negotiations, a draft text is prepared prior to the negotiations. Chapter II of the Rules of Procedure outlines rules for the preparation to Ministerial Conferences: Rule 3 provides that the provisional agenda for each Conference shall be drawn up by the Secretariat in consultation with the Chairperson, and be open to any Member to propose items for inclusion in the agenda. Inclusion depends on the agreement of the Ministerial Conference. According to Rule 5, each session shall begin with consideration and approval of the agenda.

The draft text is important, as it defines the work program and sets the agenda for the negotiations. At the Seattle Ministerial Conference in 1999, a draft Ministerial Declaration

---

<sup>76</sup> WTO Document TN/C/W/1



was not agreed upon in the beginning of the Ministerial. This was caused by unwillingness of the General Council chairman to include items proposed by a number of developing countries.<sup>77</sup>

The original mandate of the Doha Round has been amended on the Ministerials in Cancun (2003), Geneva (2004), and Hong Kong (2005) in accordance with Rule 6 of the Rules of Procedure.<sup>78</sup>

In the preparation process to the Cancun negotiations in 2003, the General Council Chairman Carlos Perez del Castillo and Director-General Supachai Panitchpakdi submitted their own draft Cancún Ministerial text<sup>79</sup> to the ministers on August 31, 2003, “on the responsibility of the Chairman of the General Council in close co-operation with the Director-General”.<sup>80</sup> In the cover letter,<sup>81</sup> they emphasized that it had not been agreed and that it is “without prejudice to any delegation's position on any issue”, but that they believe it “constitutes an adequate and manageable basis for discussion”.

New attempts to launch negotiations on the contentious “Singapore Issues” were set out in the proposed text despite continued opposition from 70 developing countries.<sup>82</sup> The Singapore issues include investment protection, competition policy, trade facilitation and transparency in government procurement. A decision on the paragraph 6 issue of the Doha Declaration on TRIPs and Public Health was “welcome”, according to paragraph 3 of the text. There is however no elaboration on the solution, despite that the 2002 deadline passed in deadlock. See more about the solution on this issue in chapter 2.5. NGOs argued that on the basis of this text, any step “forward” in Cancun would be a setback for developing

---

<sup>77</sup> WTO Documents WT/GC/W: *Preparations for the 1999 Ministerial Conference*.

<sup>78</sup> WTO: *How the negotiations are organized*.

<sup>79</sup> WTO: *Draft Cancún Ministerial Text*, August 24, 2003

<sup>80</sup> WTO: *Cover letter of the draft Cancún Ministerial text*, August 31, 2003.

<sup>81</sup> Ibid

<sup>82</sup> WTO: *Draft Cancún Ministerial Text*, August 24, 2003

countries.<sup>83</sup> The Cancun Ministerial Conference ended in deadlock on September 14, 2003 largely due to lack of consensus on the Singapore issues.<sup>84</sup>

This case clearly illustrates that informal procedures can damage the WTOs ability to function, and its internal and external credibility. It also illustrates the importance of an agreed draft Ministerial text that includes the proposals of the members, and not least the importance of WTO members and the staff in particular, to follow the rules that are established. At a General Council meeting in July 2002, procedural guidelines governing the preparatory processes of Ministerial Conferences were discussed.<sup>85</sup> See more about this discussion in chapter 1.6.4.

### 1.3.2 Transparency

Transparency is a basic democratic feature, and relates to the freedom of information. It implies openness, communication, and accountability, including participation in political processes through meetings open to press and public, and public access to government documents.<sup>86</sup> Information about public processes and decisions should be openly and freely available in order to prevent authorities from abusing the established system by e.g. taking illegitimate considerations. Transparency implies a two-way communication, where media and the public have access to meetings, information and documents from processes, and mechanisms for people and interest groups to share their view with the decision-makers and thereby have the possibility of influencing the processes and decisions.

Transparency has two important dimensions: internal and external transparency. In the WTO, internal transparency relates to access to information, negotiations and decision-making by all member countries, while external transparency concerns the access of

---

<sup>83</sup> Focus on the Global South – Geneva: *Comments on Cancun Draft Ministerial Text*, August 25, 2003.

<sup>84</sup> WTO: *Day 5: Conference ends with consensus*.

<sup>85</sup> WTO Document WT/GC/W/477: *Preparatory Process In Geneva And Negotiating Procedure at Ministerial Conferences*, June 28, 2002.

<sup>86</sup> Wikipedia: *Transparency*

citizens and civil society groups to obtain information about WTO procedures and decisions and participate in its processes.

Paragraph 10 of the Doha Declaration confirms the “collective responsibility to ensure internal transparency” and “making the WTO's operations more transparent, including through more effective and prompt dissemination of information, and to improve dialogue with the public.”<sup>87</sup> Further, paragraph 49 states that “[t]he negotiations shall be conducted in a transparent manner among participants, in order to facilitate the effective participation of all. They shall be conducted with a view to ensuring benefits to all participants and to achieving an overall balance in the outcome of the negotiations.”

The Declaration sets out a principle of internal transparency and participation directed to the member countries: they shall have the information necessary to participate fully in WTO negotiations. The internal transparency of the WTO relates to both the ability of the member country governments to obtain information about meetings and processes (whether they participate or not), and the access and invitation to consultations, negotiations and decisions.

Internal transparency is imperative for the parliamentary control within the WTO and within its member governments. Further, national parliamentary scrutiny is important for the ability of the member governments to be fully informed when deciding on national policies and positions in WTO negotiations. It is imperative for the ability of the member states to control the political governance and judicial activity of the Organization. Interaction with member state parliamentarians is therefore crucial for the legitimacy of the WTO. It also prevents the WTO from being a “closed forum of diplomacy”.

In national democratic legal systems, public access to documents is central. Sweden established constitutional rights for freedom of information as early as 1766, which specifically provides for access to government information.<sup>88</sup> In the Norwegian Public

---

<sup>87</sup> WTO Document WT/MIN(01)/DEC/1

<sup>88</sup> Articles 1 and 13 of the Swedish Constitution

Access to Documents in the Public Administration Act of June 19, 1970 No. 69, documents of the public administration are public to the extent that no exception is made by or pursuant to the statute. A common procedure to facilitate transparency in law-making processes is to submit proposals of new laws or amendment of existing laws for review to the different interest groups in the society.

Under Article V:2 of the WTO Agreement, “the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO”. Chapter X of the Rules of Procedure sets out the baseline of the external transparency of WTO negotiations: “[t]he meetings of the Ministerial Conference shall ordinarily be held in private. It may be decided that a particular meeting or meetings should be held in public” [Rule 32]. “After a private meeting has been held, the Chairperson may issue a communiqué to the Press” [Rule 33]. Participation of NGOs or civil society groups in negotiations is hence only permitted on the basis of decisions to do so.

Member countries, NGOs, and civil society groups have demanded enhanced transparency in the processes of the WTO.<sup>89</sup> There is, however, a reluctance to change the current system. Most members agree that the transparency should be enhanced, but there is no consensus on the scope and measures to be set out. A common disagreement in the debate of external transparency is who should be responsible for the increase of external transparency and public awareness of the WTO’s activities – the WTO secretariat, or the members themselves. One could argue that the WTO has a limited budget (which is also one of the main points in the Sutherland Report),<sup>90</sup> and should rather devote their time to the already extensive tasks they are set out to perform. The member governments themselves should hence be responsible for disseminating information and documents from the WTO processes to their respective populations.

---

<sup>89</sup> See e.g. Narlikar, Amrita and Ngaire Woods: *Governance and the limits of accountability: the WTO, the IMF and the World Bank*.

<sup>90</sup> WTO Consultative Board (2005): *The Future of the WTO: Addressing institutional challenges in the new millennium*. Hereafter “The Sutherland Report”.

If the members were to take upon this task, then each member would have to establish their own mechanisms. This approach would make it up to each member to establish transparency mechanisms, and the cumbersome process of reaching consensus on these issues would be avoided. Each member could hence establish mechanisms in accordance with their own needs and wishes. The danger is, however, that the current situation largely remains status quo. If the WTO shall appear and function as a legitimate institution actively regarding democratic issues, the WTO itself should establish transparency mechanisms.

After pressure from members and NGOs and members, a number of NGOs are now allowed to attend Ministerial Conferences upon request and registration. On the Hong Kong Ministerial in 2005, about 1000 NGOs were eligible to attend.<sup>91</sup> NGOs have, however, no rights to attend meeting or get their views or working papers considered – so-called “amicus curiae” briefs. A common argument of some WTO officials and members is that “NGOs should work through their capitals”.<sup>92</sup> The influence through national governments is, however, dependant on the internal transparency of the WTO.

If NGOs were allowed more participation in the WTO, it could be an important information-channel to national governments and citizens. Monitoring and information diffusion is an important role that NGOs can play for the transparency and legitimacy of the WTO. It facilitates awareness and understanding of WTO issues among domestic law-makers, and can hence also ameliorate the internal transparency of the WTO. There is hence a clear reciprocal influence among the internal and external transparency of the WTO.

The external transparency of the WTO was addressed already at the Singapore Ministerial Conference in 1996, and was added to the agenda in paragraph 6 by “renewing” the commitments to “the maximum possible level of transparency”.<sup>93</sup> Guidelines for

---

<sup>91</sup> WTO: *NGOs eligible to attend the Sixth WTO Ministerial Conference, to be held in Hong Kong, China, from 13 to 18 December 2005.*

<sup>92</sup> WTO: *The Doha Development Agenda and Beyond: Functioning and Financing of the WTO.*

<sup>93</sup> WTO Document WT/MIN(96)/DEC, December 13, 1996

Arrangement on Relations with NGOs were adopted by the General Council.<sup>94</sup> According to these guidelines, information about WTO activities and access to documents should be made available online [paragraph 3], and closer and direct contact between the WTO and NGOs should be set out [paragraphs 4 and 6]. Subsequently, significant improvements to the WTO website, primarily for external transparency purposes, enhanced both the internal and external transparency of the WTO.

A decision of the General Council on Procedures for the Circulation and Derestriction of WTO Documents set out periods of circulation and de-restriction of documents.<sup>95</sup> WTO bodies can restrict documents they issue, while members can request such restriction. Some 30 percent of WTO documents were restricted under these rules.<sup>96</sup> At a General Council meeting in May 2002, members agreed on new procedures for circulation and de-restriction of WTO documents.<sup>97</sup> When a delegation requests restriction of a WTO document, the de-restriction period is reduced from approximately eight months to between six and eight weeks. The new procedures also reduce the list of documents that can be subject to restriction.

The Sutherland Report<sup>98</sup> has a separate chapter on transparency and dialog with civil society. It starts out by identifying a wide misrepresentation in civil society discussions regarding the role of the WTO in globalization, and upholds that the members should themselves have most of the responsibility of developing relationships with civil society.<sup>99</sup> The report further focuses on economic problems related to such participation and transparency, and claims that tight budgets constrain the engagement with civil society. The report states, however, that the WTO should keep all options of transparency and

---

<sup>94</sup> WTO Document WT/L/162, July 18, 1996

<sup>95</sup> WTO Document WT/L/160/Rev.1, July 26, 1996

<sup>96</sup> Bridges: Weekly Trade News Digest, Volume 6, number 18, May 15 2002

<sup>97</sup> WTO Document WT/GC/W/464/Rev.1

<sup>98</sup> WTO Consultative Board (2005): *The Future of the WTO: Addressing institutional challenges in the new millennium*

<sup>99</sup> The Sutherland Report, paragraph 180, p. 41

dialogue with civil society under regular review, as they are in “the eye of the storm of the international development debate”.<sup>100</sup>

The report focuses on the problems connected to enhanced transparency, budgetary issues in particular. Benefits of enhanced transparency are, however, poorly evaluated. The traditional view of the WTO as a strictly inter-governmental matter seems to control the premises on which the discussion is based upon. The report’s explicit motivation for enhanced transparency is rather the wish for less negative attention than the concern of the democratic governance of the WTO, which will be important for the institutions ability to survive in the long run. Through a more open and transparent WTO, the work and criticism of civil society groups would be more nuanced and to the point than what currently seems to be the case, and the civil society misrepresentation that is pointed out in the report would probably not be so precarious.

NGOs are primarily thought of as organizations working for idealistic causes. However, NGOs also include associations for employers and employees, insurance and bank associations, associations for industrial businesses, trade coalitions, etc. A special concern of developing countries in this regard is that negotiations would be increasingly vulnerable to lobbyism if increased transparency and rights to participation for NGOs were set out. Some developing countries worry that open meetings could further displace power imbalances due to the powerful and resource lobbies and interest groups of developed countries, in particular corporate lobbying. These concerns are probably pertinent: At the Doha Ministerial Conference, corporate lobbyists outnumbered civil society groups.<sup>101</sup> Corporate lobbying has hence already solidly established its role in WTO negotiations. The US has even included corporate representatives in their delegation, both as case specific competence, and to ensure that important corporate interests are sufficiently maintained.<sup>102</sup> The strain of powerful and unsatisfied businesses can be particularly troubling in years of presidential elections.

---

<sup>100</sup> The Sutherland Report, paragraph 182, p. 42

<sup>101</sup> Oxfam (2005): *Making trade work for the poor*, (chapter 9), p 253

<sup>102</sup> Third World Network: *How low can you go?* paragraph 16

For the informatory transparency to be effective within the WTO in terms of facilitating informed participation and influence by member governments and civil society, reliable information about all processes of the WTO must be available real-time. Such transparency is prerequisite for the public support, legitimacy, and democratic control of the WTO. Citizens and interest groups should be able to stay informed at no cost. This is largely provided for by the WTO web-page. The remaining barrier to the external transparency is, however, that a number of documents are not available real-time. Timely access should be provided for unless weighty concerns are presented for restriction. This should also apply to dispute settlement documents.

### 1.3.3 Participation

A fundamental quality of democratic institutions is the ability of those subject to its authority to participate in decisions affecting them. The increasing scope and complexities of the issues addressed in the WTO creates a demand for more competent and larger delegations from the members. It creates a need for substantial human and financial resources. Richard Blackhurst reported five years ago that there was an average of 46 formal meetings per week in the WTO.<sup>103</sup> The number has probably increased since then. In addition are the many informal meetings, which are often imperative for the successful conclusion of negotiations.

Article IX of the WTO Agreement provides that “[t]here shall be a Ministerial Conference composed of representatives of all the Members”. Paragraph 48 of the Doha Declaration provides that “[n]egotiations shall be open to: (i) all members of the WTO; and (ii) States and separate customs territories currently in the process of accession and those that inform members, at a regular meeting of the General Council, of their intention to negotiate the terms of their membership and for whom an accession working party is established. Decisions on the outcomes of the negotiations shall be taken only by WTO members.”

---

<sup>103</sup> Blackhurst and Hartridge (2005): *Improving the Capacity of WTO Institutions to Fulfil their Mandate*, in *Reforming the World Trading System in Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance*, p. 465



Several countries do not have equitable representation in WTO negotiations and decision-making processes due to lack the human and financial resources. This issue is addressed by the WTO through financial assistance and capacity building programs in cooperation with the World Bank, United Nations and IMF.<sup>104</sup> These measures aim at helping developing countries to obtain larger and more trained delegations to facilitate active participation of developing countries. However, active participation in the complex and resource-demanding structure of the WTO is not possible for many developing countries. With the 40-50 meetings held in Geneva each week, they often enter negotiations less prepared than their developed country counterparts.

On average, a developing country delegation is less than half the size of a developed country delegation.<sup>105</sup> In addition, wealthy nations have a substantial support-apparatus that surrounds their delegations, including specialists in the various issues that are negotiated, trade lawyers, and sometimes even corporate representatives (read: lobbyists). Twenty-eight countries, of which eighteen LDCs, cannot afford to have permanent delegations to Geneva.<sup>106</sup> Even a large LDC like Bangladesh has only one permanent representative. The number of delegates naturally affects countries' ability to participate effectively in negotiations, and exacerbate the underlying inequalities in negotiating strength due to the flexible negotiation-structures.

Informal meetings, which is an important consensus-making feature of WTO negotiations and largely affect the ability to participate in negotiations for many members will be discussed in chapter 1.4.

### 1.3.4 Single Undertaking and Cross-Issue Linkage

In the Tokyo Round (1973-1979), negotiations were conducted on the basis of a voluntary approach, and the membership of each agreement hence varied (plurilateral agreements). This approach entailed a problem in relation to the Most Favored Nation (MFN) clause set

---

<sup>104</sup> WTO: *Trade facilitation technical assistance and capacity building*.

<sup>105</sup> Narlikar, Amrita (2005): *The World Trade Organization: A Very Short Introduction*, p. 45

<sup>106</sup> WTO: *Keeping non-resident delegations informed*, paragraph 1.

out in Article 1 of the GATT 1947. The MFN principle requires concessions made to any member extended to all WTO members, and may allow “free-riding” on the liberalization of others when applied on limited membership agreements.

The Uruguay Round applied a sector by sector principle in accordance with paragraph 3 of the Declaration: “Balanced concessions should be sought within broad trading areas and subjects to be negotiated in order to avoid unwarranted cross-sectoral demands.” The Round did, however, end up with a single undertaking. This allowed inclusion of new issues wanted by a number of developed countries, while developing countries were allowed inclusion of agriculture and textiles.

Paragraph 47 of the Doha Ministerial text provides that “[w]ith the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations.”

As mentioned in the introduction, the single undertaking approach requires all members to accept a package of negotiated agreements: “nothing is agreed until everything is agreed”. The single undertaking allows for tradeoffs across issues that otherwise are not related. Negotiating agreement across issues facilitates consensus, as members may allow inclusion of issues that they otherwise would oppose, in exchange for issues they want included on another sector of trade.

At the Cancun Ministerial Conference in 2003, the negotiations broke down because the members could not agree on the approach of the negotiation on agriculture.<sup>107</sup> In addition to illustrating the importance of agriculture to the members, it shows how important the formula for the negotiations is. The way negotiations are organized and the approach to the issues are of significance to the result of the negotiations. The influence of the process on

---

<sup>107</sup> WTO (2003): Day 5: Conference ends without consensus

the content of the final agreement is called structure-substance pairing, and is a principle common to all law.<sup>108</sup> Choosing negotiation formula is hence not only a technical or legal matter, but most of all a highly political issue, as most matters in the WTO regarding how the members shall interact.<sup>109</sup> Disagreement on the negotiation formula to be used in the agriculture negotiations was one of the main reasons for the failure of the Cancun Ministerial Conference in 2003.

Cross issue linkage was introduced in the Kennedy Round (1964-1967) to deal with the increasing variety of issues and parties in the negotiations. Cross issue linkage relates to the process of negotiating compromises across the variety of issues that are to be negotiated in the round. This approach enables solutions on sensitive issues, and is generally recognized as necessary for the multilateral approach to be continued. If compromises should be negotiated issue by issue, the probability of reaching consensus would be minimal. Through this method, countries can bargain in accordance with the importance of the issues to their national interests.

After across-the-board was adopted in the Kennedy round, a mix and match approach was applied in practice.<sup>110</sup> In the WTO, the structure for negotiations is defined for each round and each issue. The approach can hence be adapted to the challenges that face the members on specific issues. The respective preferences of the negotiating countries can be exchanged through this approach - a reciprocal exchange through issue-linkage. The trade negotiations are hence based on the principle of reciprocity or "trade-offs." That is, one country gives a concession in one area, such as the lowering of tariffs for a certain product, in return for another country acceding to a certain agreement. This approach is largely beneficial to large and diversified economies that can offer a variety of benefits. As mentioned in the introduction, many poor countries still trade in a few primary commodities, and are hence severely disadvantaged under this approach. However, their situation would probably be even more severe if "across the table" was not applied, as they would be dependant on other members' interest in the commodities and sectors which their

---

<sup>108</sup> Cottier, Thomas (2006): *Preparing For Structural Reform in the WTO*, p. 2

<sup>109</sup> Narlikar, Amrita (2005): *The World Trade Organization, A Very Short Introduction*, p. 53

<sup>110</sup> Ibid

trade is based upon. For the most part, negotiations and trade-offs take place among the developed countries and some of the larger developing countries.<sup>111</sup>

Illustrations of the “mixed approach” are services and agriculture. Under the General Agreement on Trade in Services (GATS) – a request-offer model is set out, where each member submits bilateral requests to other members on proposed areas of service liberalization. On the Hong Kong Ministerial Conference in 2005, a plurilateral request model was agreed.<sup>112</sup> In agriculture, a tiered formula approach is applied through the “July Package”, which was agreed on in a post-Cancun General Council meeting.<sup>113</sup> This is a radical approach that aims to reduce the overall level of trade-distorting domestic support, measured through the so-called “Aggregate Measurement of Support” (AMS). Through this system, countries with a high level of protection will have to make greater reductions. However, all countries can designate sensitive products to which smaller tariff cuts are required, and developing countries can designate Special Products in order to take into account non-trade concerns such as rural development.

Flexibilities in the negotiation-approach adapted to the political challenges of the issue at hand are often necessary to conclude negotiations successfully. However, as other flexibilities that facilitate consensus, issue linkage can also be used by powerful nations to extract disproportionate concessions from a weaker counterpart.<sup>114</sup> The Uruguay round makes for a good example: as commented above, developing countries got concessions on agriculture and textiles while the tradeoff was inclusion of new issues. The prospected benefits of developing countries from the inclusion of agriculture and textiles have subsequently been claimed to be illusionary,<sup>115</sup> while developed countries have established a framework for expansion and protection of their services and information industries – also in the emerging markets of developing countries.

---

<sup>111</sup> Kwa, Aileen (1998): *WTO and Developing Countries*.

<sup>112</sup> WTO Document WT/MIN(05)/DEC

<sup>113</sup> WTO Document WT/L/579

<sup>114</sup> Narlikar, Amrita (2005): *The World Trade Organization, A Very Short Introduction*, p. 54

<sup>115</sup> Stiglitz, Joseph (2005): *Fair Trade for All*, pp. 46-47

Issue-linkage also extends beyond trade: some developed countries are known for giving bilateral carrots through aid, loans, regional trade arrangements etc, or threatening to withdraw existing beneficial arrangements in return for withdrawal from a certain position or agreeing to a concession.<sup>116</sup> Issue-linkage can hence exacerbate power asymmetries within the WTO membership, as developing countries sign agreements that do not serve, or may even be detrimental to their development objectives.

### 1.3.5 Special and Differential Treatment

Special and differential treatment (SDT) was introduced through the so-called “Enabling Clause” that was introduced through the decision of November 28, 1979 on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries.<sup>117</sup> The special and differential treatment principle implies that international trade rules should be adapted to the particular economic situation of developing countries. The principle has two main aspects: (1) With respect to market access commitments, SDT is provided for through non-reciprocal trade obligations in order to provide preferential access for developing country exports in developed country markets; and (2) With respect to trade rules and disciplines, SDT means that developing countries can be exempted from obligations to implement particular trade rules, and may be granted longer implementation periods and technical assistance for implementation of commitments. All developing country members are eligible for SDT.

Paragraphs 1 and 2 of the Preamble of the WTO Agreement provides that the parties’ “relations in the field of trade and economic endeavor should be conducted ... in a manner consistent with their respective needs and concerns at different levels of economic development, *Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development...”.

---

<sup>116</sup> Narlikar, Amrita (2005): *The World Trade Organization, A Very Short Introduction*, p. 52

<sup>117</sup> WTO Document L/4903, November 28, 1979

In accordance with this aim, paragraph 50 of the Doha Declaration provides that “[t]he negotiations and the other aspects of the Work Programme shall take fully into account the principle of special and differential treatment for developing and least-developed countries embodied in: Part IV of the GATT 1994; the Decision of November 28, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries; the Uruguay Round Decision on Measures in Favour of Least-Developed Countries; and all other relevant WTO provisions.” The actual content of the principle in the Doha Round is determined by a number of decisions reached on the various issues.

The non-reciprocity principle was introduced in the Tokyo Round through the so-called “Enabling Clause”, which is the legal basis for the Generalized System of Preferences (GSP). Under the GSP, developed countries may offer non-reciprocal preferential treatment (e.g. through low duties on imports) to products originating in developing countries. When developed countries grant trade concessions to developing countries they should not expect the developing countries to make matching offers in return – i.e. non-reciprocity. The countries that grant preferences determine which countries and products that are eligible for special treatment. Non-reciprocal market access to developing countries hence allows discrimination in favor of developing countries. Part IV of the GATT 1994 includes provisions on non-reciprocal preferential treatment for developing countries. However, developing countries claim that Part IV has been without practical value as it does not contain any obligations for developed countries.<sup>118</sup>

An example of longer periods of transition is the implementation of the TRIPs Agreement. Developed countries had one year to implement their obligations, while developing countries were given 6 years with possibility of 5 years extension if they did not provide patent protection. LDCs do not have to be TRIPs compliant until 2013, with additional exceptions in relation to pharmaceuticals. See more about this in chapter 2.2.1.

---

<sup>118</sup> Lal Das, Bhagirath: *Strengthening Developing Countries in the WTO*.

Waivers from WTO rules may be granted by the General Council in accordance with Article IX:3 of the WTO Agreement, e.g. the June 1999 waiver for LDCs.<sup>119</sup>

The special and differential treatment measures set out through limited reciprocity in trade negotiations, temporary exemptions, and longer transitional periods for implementation of commitments provide important mechanisms for developing countries to adapt to international trade. Nevertheless, many are still far from fully integrated in the world trading system.

#### **1.4 Informal Consultations: Legitimate Bargaining or Democratic Deficit?**

There is a long history of tension between formal and informal processes of consultation and negotiation.<sup>120</sup> The informal consultations in WTO negotiations are derived from the “principal supplier” principle of the GATT 1947, where the large traders set the premises. Tensions over informal meetings were spurred at the Seattle Ministerial Conference, as developing countries refused to accept the proposed agenda. Countries not invited to the Green Room shared their frustrations with the press, and a number of countries brought up the issue of exclusion from important negotiations, due to informal processes.<sup>121</sup> The question is whether these informal practices exclude the effective participation of developing countries, and hence are fundamentally undemocratic, or are they a legitimate bargaining tool which is necessary to achieve consensus, and thereby enable the making of new multilateral trade rules.

On WTO Ministerial Conferences and the everyday operations, decisions are reached by consensus, not voting. Consensus is largely negotiated in informal meetings. These

---

<sup>119</sup> WTO Document WT/L/304: *Preferential Tariff Treatment for Least-Developed Countries*.

<sup>120</sup> Blackhurst and Hartridge (2005): *Improving the Capacity of WTO Institutions to Fulfil their Mandate*, in *Reforming the World Trading System in Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance*, p. 455

<sup>121</sup> *Ibid*, p. 456

meetings are often dominated by the Quad group, the US, EU, Japan and Canada.<sup>122</sup> As an example the final negotiations of the Agreement on Agriculture in the Uruguay Round was negotiated between the EU and US, and then presented to the membership for adoption. This despite the fact that agriculture was one of the benefits offered developing countries as a trade-off so they should accept inclusion of new issues. The differences among the EU and the US regarding the appropriate level of protection and subsidizing was nevertheless the crucial point in the agriculture negotiations.

The formal groups for trade negotiations within the WTO are the Ministerial Conference, the General Council, the Trade Negotiations Committee (TNC), and several Negotiating Groups. These are established through Article IV of the WTO Agreement and paragraph 46 of the Doha Declaration. However, informal consultations without any legal basis play a vital role in bringing the WTO membership to agreement.

#### 1.4.1 Experiences from GATT

The Consultative Group of Eighteen (CG 18) existed from 1975 to 1985. It was temporarily established in 1975, but became permanent in 1979. The group debated the major policy issues, anticipated problems, and provided strategic direction for negotiations. It had an advisory function, and forwarded recommendations to the membership.

Not unexpectedly, one of the major difficulties at the time it was established was to negotiate the composition of the group. The group consisted of 18 full members and 9 alternate members with right to speak. The group mandate had a provision for rotating membership, namely “as appropriate”. The group was not transparent. Even papers prepared by the secretariat were not circulated to the membership.<sup>123</sup> Detailed reports were however submitted to the GATT council. The group discussed a number of issues subsequently included in the Uruguay Round agenda, including TRIMS, TRIPs and GATS

---

<sup>122</sup> Narlikar, Amrita and Ngaire Woods (2001): *Governance and the Limits of Accountability*.

<sup>123</sup> Blackhurst and Hartridge (2005): *Improving the Capacity of WTO Institutions to Fulfil their Mandate*, in *Reforming the World Trading System in Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance*, p. 465



issues. Major contributions to the transition from GATT to WTO were set out by the group.<sup>124</sup>

However, composition difficulties and expanded membership made several members find the group too large to be efficient, and some argued that the group was inappropriate when the Uruguay Round was in progress. The group largely ceased to function after the process broke down in 1986 over disagreement over the launching of a new round. Many informal and ad hoc meetings after the establishment of the WTO were composed by many of the same members. These consultations discussed strategic issues as the CG18, but they did not have any mechanisms for reporting or power to recommend to the membership. The CG18 has close similarities to the IMF and World Bank Executive Boards, but with one important difference: it did not have authority to make decisions on behalf of the membership.

#### 1.4.2 Green Room Consultations

The Green Room consultations have its name from the color of the Director-General's conference room. These meetings consist of a limited group of the membership with more or less the same participants, a kind of "inner circle" meetings. They are either called by the Director-General, or the chairperson of a committee. There is a distinction between Green Room consultations used at Ministerial Conferences, and when used at an ambassadorial level regarding the regular business of the organization. This discussion is limited to the first, but many of the same considerations also goes for the latter.

Trade negotiators can rarely explore the limits of their partners' flexibility, or expose their own difficulties in big on-the-record meetings.<sup>125</sup> Hence, the Green Room model deals with the problem of having too many parties present in a negotiation, as the WTO has no formal steering body with limited membership such as the executive boards of the IMF and the

---

<sup>124</sup> Ibid

<sup>125</sup> Blackhurst and Hartridge (2005): *Improving the Capacity of WTO Institutions to Fulfil their Mandate*, in *Reforming the World Trading System in Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance*, p 464.

World Bank. The Green Rooms do, however, resemble the executive boards. The important difference of the WTO consultations is that they are not a part of the formal organizational structure, and do not have any (formal) decision-making powers. There are hence no rules (or practices) ensuring a fair composition or transparency. The composition is however somewhat predictable, as these consultations mainly comprise large industrialized members.<sup>126</sup>

The Green Room meetings have a limited number of participants, usually between 20 and 40.<sup>127</sup> 110 or more members are hence routinely excluded from the consultations. This is not a problem when narrow issues involving only a small part of the membership are negotiated. It is also useful for consultations with delegations from the countries crucial for a solution on the issue, i.e. resolving problems among key opponents.

However, the main problem of Green Room consultations is exposed when members wanting to participate in meetings are excluded. Exclusion of members with legitimate interests in the issue at hand from key negotiations is not democratic, particularly when the process does not follow rules of transparency and rotation of the membership. After Green Room consultations, further negotiations on an issue are often not possible due to time limits and substantial agendas. The option of the remainder of the membership is in such situations either to accept or decline the proposition from the meeting submitted to the membership. Compromises are hence in effect struck behind the back of a large part of the membership.

The Green Room had a large role under the GATT, where concessions were negotiated under the “principal supplier” principle. The countries primarily concerned, mostly large and industrialized nations, negotiated solutions that subsequently were submitted to the other members. However, many circumstances have changed considerably since the GATT.

---

<sup>126</sup> Narlikar, Amrita and Ngaire Woods (2001): *Governance and the Limits of Accountability*.

<sup>127</sup> WTO: *Whose WTO is it anyway?*

First of all, the membership has increased, and the Uruguay Round from 1986 to 1994 included a large number of developing countries. Secondly, the scope and range of issues proliferated with the Uruguay Round. Many of the new agreements have a greater and more direct impact on the members, in particular the “behind the border” regulatory regimes such as in services, intellectual property, investment, and competition, and are hence of key importance to most members. Further, developing countries have gained a greater ability to participate in WTO negotiations due to an increasing number of emerging and transition economies, and technical and financial assistance. Furthermore, the multilateral approach through the Single Undertaking makes all agreements mandatory (except two plurilateral), which contrasts with the voluntary approach that developed under GATT. Finally, the losing party in a dispute can no longer block dispute settlement decision. The legally binding character of the obligations has hence become stronger.

The limited flexibilities in terms of the Single Undertaking and binding dispute settlement, and the “behind the border” tendency of WTO policy, makes participation in the negotiations increasingly important to all members.

Petersmann (2005) argues that the Green Room consultations are not a north-south issue, but rather an insider-outsider issue. The background for this statement is that a large part of the membership actually is excluded from these meetings, not only developing countries. However, the solutions negotiated in the Green Room are likely to be somewhat more in accordance with developed countries’ interests. The usual composition of the meetings includes a number of major industrialized nations, and a few large developing countries such as Brazil and India. Developed countries are hence both of majority in number and power when brokering compromises. Further, the interests of emerging and partly industrialized developing economies are in most issues not representative for the bulk of developing countries, and the interests of most developed countries have in many issues a tendency to be more harmonized than those between developed and developing countries. This is particularly true in issues of great importance to many developing countries, such as agriculture, textiles and intellectual property regulation. The effects of the Green Room process are hence frequently more detrimental to the interests of developing countries, and the issue must be characterized as having a north-south dimension.

Green Room consultations are organized ad hoc; as mentioned above, they do not follow explicit rules or guidelines. The only thing that is quite constant from meeting to meeting is the composition; the same large, industrialized countries have in effect permanent seats.<sup>128</sup> These consultations are, however, largely tolerated because they are recognized as necessary in order to reach consensus.

Developing countries have put forth proposals for institutional reform, which makes WTO-functioning tightly bound to clearly specified rules and procedures. Reluctance from major traders have, however, effectively prevented such developments. In a WTO meeting in 2002 on the “Functioning and Financing of the WTO”, it was noted that some informal ground rules for consultations were established in the aftermath of the Seattle Ministerial Conference and that these should be refined and codified.<sup>129</sup> It included announcing consultations in small groups, requests by Members to be included in such consultations, sharing information from the “open-ended” meetings, and that decisions should only be taken in such open-ended meetings.<sup>130</sup> Resuscitation of the CG 18 was also discussed, e.g. formal establishment of a limited membership body. However, no further measures have subsequently been set out.

### 1.4.3 Implications of Informal Consultations

Members have a tendency not to change their positions in meetings including the full membership. Meetings in limited membership groups are indeed necessary to achieve compromises under the existing institutional framework. As mentioned above, it is an effective mechanism when issues with a limited number of interests are involved. However, most issues in the actual negotiations affect a larger number of countries due to the reasons pointed out above, and often in a substantial manner. If a limited membership process is to have democratic legitimacy, the composition of the group has to be somewhat representative for the membership. Otherwise, power imbalances might be exacerbated as small and most developing countries are not admitted to key negotiations.

---

<sup>128</sup> WTO: *Understanding the WTO – Whose WTO is it anyway?*

<sup>129</sup> WTO (2002): *The Doha Development Agenda and Beyond: Functioning and Financing of the WTO.*

<sup>130</sup> WTO (2002): *The Doha Development Agenda and Beyond: Functioning and Financing of the WTO.*

The ways in which decisions are prepared and negotiated naturally affect their outcome. This is the so-called structure-substance pairing effect. The GATT system persisted in terms of largely informal negotiating structures defined for each round.<sup>131</sup> The GATT cultures that made the participation of developing countries in the GATT marginal, have persisted in the decision-making procedures of the WTO. Pascal Lamy, the Director-General of the WTO, admits that informal meetings often entail a predetermination of issues among coalitions of states.<sup>132</sup> Informality and flexibility (i.e. lack of precise rules) may be needed to make compromises in difficult negotiations.

Members rarely change their positions in meetings of the full membership.<sup>133</sup> Brokering compromises in smaller groups alleviate the process of finding compromises, and is legitimate when the parties are somewhat equal. However, most developing country economies are somewhat dependant on the large members of the WTO, such as the US, EU, or Japan in terms of imports, exports, aid, security, etc. Obstruction of consensus in the WTO might threaten these connections for the dissenting developing nations.

A Stanford research paper concludes that the informal “concentric circles” model can only damage the WTOs ability to function, and its internal and external credibility.<sup>134</sup> Although there has been less use of the Green Room after the Uruguay Round, informal meetings are still central for reaching consensus in the WTO. The influence on negotiations related to economic strength may seem to be exacerbated by such informal meetings, which hence represents a democratic deficit.

To formally establish a limited member sub-group would indeed be difficult, as it requires consensus of the whole membership [Article IX of the WTO Agreement]. At the least, guidelines for informal consultations should be established in order to increase transparency and the predictability of their composition. This would facilitate and legitimize this way of negotiating solutions and consensus. However, finding a

---

<sup>131</sup> Cottier, Thomas (2006): *Preparing For Structural Reform in the WTO*, p. 1

<sup>132</sup> Tufts University (2006): *Comment by Mr. Lamy*.

<sup>133</sup> WTO: *Whose WTO is it anyway?*

<sup>134</sup> Blackhurst, Richard (2000): *Reforming WTO Decision Making: Lessons from Singapore and Seattle*, p. 3

representative and feasible selection for the 149 members is in itself a difficult task with probable failure in the negotiations. The solutions that are negotiated in informal meetings must be recommendations, and cannot be decisions that bind the membership. When negotiations are organized in such a way that the proposition of the Green Room consultations is the only option for an agreement, the consensus process provides an element of an exclusionary device for powerful countries. Alternative solutions should hence be put forth to prevent the “bad deal or no deal” option.

Developing countries are in the Green Room consultations not only outweighed in terms of economic and political power, but also in numbers. George Monbiot wrote in the Guardian that “[i]n principle, the poor members of the WTO can and should outvote the rich ones. In practice, its democratic structure has been bypassed by the notorious “green room” meetings organized by the rich nations, by corporate lobbying and by the secret and unaccountable committees of the corporate lawyers it uses to resolve trade disputes.”

There is a lack of attention to procedural issues in the WTO, so-called “horizontal issues”.<sup>135</sup> It has been brought up by developing countries a number of times, has been included in Ministerial Declarations, and addressed in a General Council meeting in 2001. However, these efforts have not led to any alterations regarding informal structures.

Limited membership groups seem inevitable within the existing institutional structure of the WTO. However, the main problem of all the informal groups is the lack of predictability and transparency. There are no rules ensuring a democratic composition, and no mechanisms for sharing the progress and outcome of the meetings with the rest of the WTO membership. Establishing rules for composition of key members on the issue at hand, as well as a transfer of solutions to the membership and transparency, would give the meetings a more legitimate character, and prevent exacerbation of power imbalances.

---

<sup>135</sup> Cottier, Thomas (2006): *Preparing For Structural Reform in the WTO*, p. 1

## 1.5 Improvements and Alternatives

The need for global governance increases rapidly, especially within the area of trade. Technological progress and the rapid growth of emerging and transitional markets are among the factors. The WTO rules and agreements, however, have not followed this progress; they largely remain status quo. In addition, the Organization suffers from a lack of democratic procedures. There are hence problems with the democratic qualities, and the efficiency in WTO decision-making and negotiations. The negotiations on agriculture were one of the main reasons for the deadlock in the Doha round of negotiations, which were suspended at the end of July 2006.<sup>136</sup> Even if the current round of negotiations should be brought to conclusion, it seems clear that the current system does not function satisfactory in either of the two regards mentioned.

The regulation of negotiations and decision-making must be balanced between democratic considerations ensuring all members an appropriate say, and the need for effectiveness in developing new world trade rules. As mentioned above, these features are to some degree antagonistic. Democratic procedures are often very time-consuming, but should be regarded to the greatest extent possible within an appropriate time-frame. However, a question in this regard is whether other negotiation and decision-making models could strengthen both as well as attaining a more appropriate balance in comparison to the current system.

The decision-making and negotiations of the WTO can be improved in two ways: Either by amending the rules and agreements, or by changing the practices, i.e. within the existing legal framework. This chapter discusses the recommendations forwarded in the Sutherland Report, the multilateral versus the plurilateral approach, voting versus consensus, and possible improvements within the consensus process.

---

<sup>136</sup> WTO: *June / July 2006 modalities meetings*.

### 1.5.1 Responsibility for Procedural Issues

It is often argued that the WTO is either more or less than its member countries, leading to statements such as “If WTO is medieval, it’s because the world is too”.<sup>137</sup> James Bacchus, US trade representative, points out that the WTO is only a label on the vast majority of the world’s nations in their common efforts to make the international trade flow smoother.<sup>138</sup> Further, that the WTO is either more or less than its membership, and that it is democratic to the extent its members are democracies, hence being inseparable from the individual legitimacy of each member. This reasoning is flawed. In accordance with the structure-substance pairing principle, the ways by which decisions are made and prepared affects the outcome<sup>139</sup>. The WTO negotiations are a power-struggle outside the boundaries of national, democratic arenas. Each country attempts to get their national interests through, usually to the greatest extent possible. Although the representatives to the WTO are elected by the leaders of the member governments, and these define the outcome of negotiations, domestic rules and democratic processes do not apply to the WTO. The WTO itself has rules and procedures governing the democratic structure and operation of negotiations and decision-making. These rules and procedures are partly negotiated among the members of the WTO, but most of them are derived from the customs and diplomatic practices developed under GATT 1947. The content and enforcement of these rules, and absence of such, determine the extent to which the WTO has democratic legitimacy. It can hence not be measured by the aggregation of the members’ democratic legitimacy. It must be measured from the rules, practices and outcome of the interaction that takes place in the WTO system.

This kind of disclaiming of responsibility is common in the rhetoric of some WTO officials and members in relation to criticism of the fundamental features of the existing system. In

---

<sup>137</sup> Queens University School of Policy Studies: “The WTO in suspense: is medieval decision-making part of the problem?”, Robert Wolfe, WTO Public Forum, September 26, 2006

[http://www.wto.org/english/forums\\_e/public\\_forum\\_e/presentation\\_wolfe.ppt#1](http://www.wto.org/english/forums_e/public_forum_e/presentation_wolfe.ppt#1) (11.16.2006)

<sup>138</sup> James Bacchus, (trade representative, US Congress and AB Member), *A Few Thoughts on Legitimacy, Democracy, and the WTO*, in *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance* (2005) p. 430

<sup>139</sup> Cottier, Thomas (2006): *Preparing for Structural Reform in the WTO*, p. 1



the transparency-issue, the same rhetoric is applied, placing the responsibility on each member. This approach leads to a pulverization of responsibility that should not be tolerated from an inter-governmental organization of such size and importance as the WTO. The WTO must be accountable for the democratic legitimacy of its procedures and structures, and therefore establish adequate rules that ensure democratic governance. Issues regarding the fundamental features of the WTO as an international body should hence be solved collectively, and not be left to each member. Again, the lack of attention to procedural issues in the WTO is damaging to developing countries.

### 1.5.2 The Sutherland Report

The Director-General Supachai Panitchpakdi of the WTO created a Consultative Board of eight independent persons in June 2003.<sup>140</sup> The Consultative Board shall “look at the state of the World Trade Organization as an institution, to study and clarify the institutional challenges that the system faced and to consider how the WTO could be reinforced and equipped to meet them”.<sup>141</sup> In January 2005, the Consultative Board released a report: *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, also called the Sutherland Report after the name of the chairman. The Director-General clarifies the aim of the report in the foreword: “The essential purpose of this Report is to examine the functioning of the institution – the WTO – and consider how well equipped it is to carry the weight of future responsibilities and demands.” The report sets forth a number of recommendations which are up to the membership to negotiate and set out.

The report identifies decision-making as a key challenge, and discusses whether the consensus rule should be modified. It notes that consensus is increasingly difficult to achieve due to a growing membership and the amount of sensitive issues, and recommends making distinctions for “certain types of decisions, such as purely procedural issues”. For such issues, it opens for alternative methods such as voting.

---

<sup>140</sup> WTO Document Press/345: WTO Director-General Establishes a Consultative Board on the Future of the Multilateral Trading System. June 19, 2003

<sup>141</sup> Ibid

It further recommends a number of other measures ensuring efficiency in decision-making, including annual Ministerial Conferences instead of the existing biennial, and the establishment of a senior official's consultative body.<sup>142</sup> Annual Ministerial Conferences would further exacerbate the ability of many developing countries to participate effectively in the WTO. It would probably also further increase the pace of expansion to new issues. However, it could also have positive effects if the agenda is not expanded. The negotiation processes would be afforded more time, which could have positive effects on the way in which consensus is achieved. This could prevent some cases of adoption of informal group proposals because of the negotiation deadline - the "bad deal or no deal" option.

The proposed senior official's consultative body shall gather senior policy-makers from capitals two to four times a year. The membership shall be limited to a maximum of 30 seats, with permanent seats for major trading nations but a majority of seats filled on a rotating basis. The consultative body suggested is quite similar to the CG 18 described above in chapter 1.4, which operated under the GATT from 1975 to 1985. As pointed out there, the CG 18 is in many ways similar to the Executive Boards of the IMF and the World Bank, but without formal decision-making power. This is also the feature of the suggested consultative board. Its functions would be limited to discussing the "political/economic environment as well as current dossiers", and provide "some political guidance to negotiators".<sup>143</sup> A steering body with decision-making powers is not discussed in the Report. That is probably because of the explicit limitation of the Report to "less radical approaches".

The proposed body is not far from a formalization of the Green Room consultations. Positive aspects of a formalization is, as discussed in chapter 1.4.3, that rules and guidelines on predictability through rotating membership and transparency could be established. Agreement on which countries should be represented is a difficult task. A permanent membership of the body would be highly controversial, and would probably not

---

<sup>142</sup> The Sutherland Report pp. 69-70

<sup>143</sup> The Sutherland Report p. 71

be possible to agree on. A varying membership with equal right to participation could be feasible, but also the tasks and role of the body is likely to create controversy. The controversy that has been attached to the Green Room process, is likely to make the negotiations on composition and rotation very difficult. As commented above, this was one of the great difficulties when the Consultative Group of 18 was established. Furthermore, the reluctance from several large traders on decreasing the current flexibilities would probably be prohibitive in the current political climate of the WTO.

The report further recommends examining plurilateral agreements as a tool where it is impossible to move forward in negotiations and a group of members are willing to pursue the issue under voluntary signing. This approach, with different obligations for the various members, is called “variable geometry” in the report. It was used in the Tokyo Round (1973-1979) under the GATT, and was then proven unsuccessful. However, the use of GATT codes proliferated, and ended up with a mix of 180 codes with largely differentiated membership. A condition for the plurilateral approach must hence be that it is limited to a few issues of great importance to a group of members. An opening for this approach could decelerate the pursuit of bilateral and regional arrangements, which have proliferated in recent years among others due to the numerous failures of WTO negotiations. The report expresses concern over the proliferation of preferential trade agreements and its impact on the national treatment and MFN rules in recent years.

It also suggests requiring a written declaration from members blocking a widely supported proposal, addressing the specific negative effects for the country’s vital interests, and thereby making it more difficult politically for countries to block a widely supported solution without compelling reasons.<sup>144</sup> However, requiring such a statement is not likely to change the mind of large nations when blocking a proposal, e.g. when the US blocked the solution put forth on an interim waiver on the paragraph 6 issue under the TRIPs Agreement in December 2002, the so-called Motta text (see chapter 2.5.1). It could have an effect if one or a few small and developing countries considered to block a decision. This would however participate in exacerbating the power-imbalances in the WTO negotiation-

---

<sup>144</sup> The Sutherland Report p. 64

process, which can not desirable. Further, it would be problematic to enforce the requirements of the statement by forcing the blocking countries to be specific on the “compelling reasons”. Such an arrangement would probably end up with a repetition of the reasons stated in the negotiations prior to the blocking, and would have little or no actual effect in terms of enhanced ability of the WTO membership to reach consensus on important issues.

### 1.5.3 Multilateral versus Plurilateral Approach

In accordance with Article X (9) of the WTO Agreement, inclusion of plurilateral agreements require consensus. According to Article II (3), plurilateral agreements are binding upon the accepting members, but signatories are not required to apply them on an MFN basis – so-called conditional MFN.

The basic problems of a plurilateral approach within the WTO is who should be allowed to participate in the negotiations, whether the plurilateral agreements should be applied on an MFN basis, and how the DSU and DSB would apply to such agreements. Many developing countries have also expressed concern of pressure to sign such agreements in relation to the unilateral request system set out under the GATS.<sup>145</sup> Further, the rules of new plurilateral agreements are likely to reflect the interests of high-income countries: Advanced developed countries have pressed on for the inclusion of new issues, in particular typical advanced-economy issues such as the Singapore issues.

As a WTO objective is a multilateral trade policy, the WTO predominately uses this approach for several reasons. First of all, progress in sensitive areas such as agriculture is possible because of the “across the table” and “single undertaking” approach. However, complex negotiations with largely different interests presented leads to inefficiency in decision-making and compromises among the large traders that might have detrimental effects to the interests of small and developing members. The WTO multilateral

---

<sup>145</sup> GATS unilateral requests were agreed upon in the Hong Kong Ministerial Conference, see WTO Document WT/MIN(05)/DEC

negotiations offer a great potential, and is indeed a desirable approach for making international trade rules.

The difficulties reaching consensus with the multilateral approach is often caused by the structure of the WTO membership. Increased participation of developing countries and the increasing importance of emerging market economies such as India and China in the international trading system make the interests that have to be reconciled in negotiations largely diverse. This development was illustrated when the Doha negotiations again was suspended in July 2006.<sup>146</sup>

However, massive difficulties face the advancement of multilateral trade rules and hence international trade due to both the principle and consensus, but also the single undertaking principle: Experiences from ministerials show large time requirements, reluctance in reneging national interests, and numerous deadlocks. The question is whether the plurilateral approach should be allowed on more issues to facilitate agreement on these areas, and alleviate the pressure on developing countries for further expansion and implementation. This way, developing countries would not be pushed into cumbersome negotiations they do not want to participate in.

This has led to a rapid increase in members pursuing their trade through bilateral and regional trade agreements. This is not desirable for global trade due to competitive distortions, sensitive areas are phased out, weakening the multilateral trade, not effective dispute settlement; large traders would in greater extent than in the WTO be able to abuse their position.

Currently, all WTO Agreements apply to all members, except two. The two plurilateral agreements, which are attached to Annex 4 of the WTO Agreement, are the Agreement on Trade in Civil Aircraft [Annex 4 (a)], Agreement on Government Procurement [Annex 4 (b)]. The International Dairy Agreement [former Annex 4 (c)], and the International Bovine

---

<sup>146</sup> The General Council, at its meeting on July 27-28 2006, supported a recommendation by Director-General Pascal Lamy to suspend the Doha negotiations, see WTO News at: [http://www.wto.org/English/news\\_e/news06\\_e/gc\\_27july06\\_e.htm](http://www.wto.org/English/news_e/news06_e/gc_27july06_e.htm) (11.21.2006)

Meat Agreement [former Annex 4 (d)] were deleted in accordance with Article X (9) of the WTO agreement. Allowing plurilateral agreements makes it possible to establish rules on areas where consensus cannot be reached by the multilateral approach. The negotiations are likely to be easier with more homogenous participants. In addition, it enables rules that take greater concern of the respective interests involved.

The benefits of applying a plurilateral approach is that smaller groups of participants have to reach agreement and the participants can change from issue to issue. This facilitates greater flexibility in content and scope of the agreement. The approach could be applied on issues where reaching consensus among all WTO members has shown itself impossible, such as several of the Singapore issues.

A plurilateral approach on issues highly controversial to some countries and very desirable and important to others, such as the Singapore issues, could increase the making of trade rules on such areas and prevent members from pursuing bilateral and regional arrangements. As discussed above, such arrangements may further exacerbate power-imbalances when employed between developed and developing countries. However, it could be argued that a plurilateral approach might weaken the ability to reach compromises on sensitive under the issues single undertaking and thereby undermine the multilateral approach. This would however depend on the extent of plurilateralism.

As the Cancun Ministerial Conference ended in deadlock in September 2003, the EC stated that it is desirable to pursue the issues multilaterally, but that it may adopt a new approach and remove the issues from the single undertaking of the negotiations and negotiate them as plurilateral agreements if necessary. The EU also proposed a plurilateral approach to boost the service liberalization under the GATS Agreement. The GATS is only a framework for liberalization of services, as a multilateral agreement on liberalization of specific service sectors has not been possible. The approach for liberalization under GATS has so far been bilateral requests. A plurilateral approach under GATS was included in the mandate set out in the ministerial declaration, and agreed upon at the Hong Kong

Ministerial Conference. The system for services liberalization now includes collective requests.<sup>147</sup>

Consensus brings with it a risk of paralysis and subsequent flight to other forums. However, there is little support for radical changes of the decision-making procedures. This may be caused by the awareness of the advantages of consensus among the members, and not least the likelihood of achieving agreement on an alternative. This is also the reason to why substantive changes were not suggested in the Sutherland Report, as radical reform would not “have commanded the degree of support necessary for them to be affected”.<sup>148</sup>

The plurilateral approach could be one way to proceed on difficult areas e.g. the Singapore issues. As mentioned above, the request-system under the GATS has been made plurilateral through so-called collective requests. The plurilateral approach must of course be applied with caution, because it could undermine and weaken the multilateral framework, and create gaps between groups of the membership in terms of obligations and participation. It also may create problems in regard to application of the MFN rule and the dispute settlement system, as was evident in the plurilateral proliferation under the GATT.

#### 1.5.4 Consensus versus Voting

Reaching agreement among the 149 members of the WTO is necessarily a troublesome process. The basic features of the consensus-model further exacerbate the time-requirements and the probability of deadlock.

It could be argued that if voting was the general rule in the WTO, developing countries in power of numbers, given the fact that they account for about three fourths of the WTO membership, would be able to force through their solutions without regard to other members' interests. This is of course given that they vote as a block. In that case, they could outvote developed countries both on a rule of two-thirds majority and three-fourths majority of the votes. However, given the large differences in trading, technological and

---

<sup>147</sup> WTO Document WT/MIN(05)/DEC

<sup>148</sup> The Sutherland Report p. 5

development advancement within the group, risks of exclusion of developed countries are an unlikely scenario. It would nevertheless provide sufficient doubt among developed countries for such a solution to gain the support necessary.

However, the majority of vote approach could be applied in a limited scope rather than replacing the consensus model, which would probably be a more feasible solution than any of the alternatives presented above. For example, majority of vote could be applied for some types of decisions without large significance, in particular procedural issues. Election of Director-General, and negotiation formula and agenda for Ministerial Conferences have shown to be controversial, bearing in mind the experiences on these issues at Seattle and Doha. A majority of vote rule for these issues would hence not be likely to be viable.

The Sutherland Report opens for alternative ways of decision-making for “purely procedural issues”, but it also states that “voting is rarely, if ever, a wise alternative” to consensus decision-making.<sup>149</sup> However, deadlocks on ministerials are seldom caused by disagreement on such decisions, rather the solution on sensitive areas or even the entire package. A majority of vote on procedural issues could facilitate some of the decision-making, but would not prevent stalemate on large issues. To apply a majority of vote for some decisions would not require amendment, only a change in the practice, as voting is already allowed as a secondary way of reaching a decision. For important issues, including application and interpretation of rules and adoption of new rules, consensus is probably the only feasible solution.<sup>150</sup>

As provided for in the WTO Agreement, voting can be used if consensus cannot be achieved. If this procedure were made operational, it could give powerful members an incentive to accommodate developing countries in a greater extent in the consensus process, as if consensus cannot be achieved, developing countries would have a greater say in the following voting.

---

<sup>149</sup> The Sutherland Report p. 65

<sup>150</sup> Here also the Sutherland Report



The weighted voting system set out in the World Bank is based on financial contributions. In the WTO, the basis for the weight could be share of world trade, population, degree of market openness, GDP etc., either using one of them, or two or more in combination. Large members have several times advocated a trade-weighted voting system, e.g. in relation to election of Director-General. To achieve consensus among the WTO members on which combination that should be applied is indeed a troublesome task. It seems literally impossible in the present political climate within the WTO membership, bearing in mind the difficulties reaching consensus on relatively simple issues and the many failures since the establishment of the WTO. In addition, most members have expressed general scepticism and reluctance to radical institutional changes.<sup>151</sup>

Consensus gives small and poor nations some degree of influence due to their possibility of blocking decisions, and increases the likelihood of implementation compared to majority of vote. Decisions forced upon a member by majority of vote could raise implementation problems.

### 1.5.5 Improvements to the Consensus Process

In the Uruguay Round, attempts were made to formalize and legalize some of the decision making procedures, but the WTO adhered to GATT practices. These weaknesses were though probably what made it politically feasible for the major trading nations; as pointed out above, the flexibilities entailed by informality is an effective tool for these members to pursue national interests, often on expense of weaker participants.

As concluded above, the practice of consensus on important issues is unlikely to be changed. Facilitation of the consensus process hence has to be examined. Paralysis of negotiations, which we have several examples of after the establishment of the WTO, results in members seeking other forums for trade cooperation. There has been a rapid increase in bilateral and regional trade cooperation the previous years.<sup>152</sup>

---

<sup>151</sup> See e.g. the General Council meeting in 2002: *Preparatory Process In Geneva And Negotiating Procedure at Ministerial Conferences*, June 28, 2002. WTO Document WT/GC/W/477

<sup>152</sup> UNESCAP: *2005 Economic and Social Survey of Asia and the Pacific*, April 25, 2005

At a General Council meeting in June 2002, procedural guidelines to govern the preparatory processes of Ministerial Conferences and the decision-making at the Conferences were discussed.<sup>153</sup> The members were divided as to whether there should be such guidelines, or if the current flexible procedure was the best way to proceed. Procedures for election of Director-General when consensus cannot be achieved were also addressed. The disputed trade-weighted voting proposal was raised again, but rejected by Brazil and India.

The Like-Minded Group (LMG) comprised of Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe presented a set of proposals aimed at preventing flexible procedures such as the ones adopted at Doha Ministerial Conference. A counter-proposal was presented by the “group of nine”, comprising Australia, Canada, Chile, Hong Kong, China, Korea, Mexico, New Zealand, Singapore and Switzerland. This group rejected the criticisms against the procedures adopted at Doha, and did not see the need for additional or different procedures.

The EC and Japan wanted to keep the flexible non-procedures as at Doha, and in the matter of Director-General election, they expectantly preferred trade-weighted voting. Norway’s ambassador Kaare Bryn, then General Council chairman, acknowledged that strict rules and procedures might not be the solution, but advocated guidelines that could enhance the predictability of the processes at Ministerial Conferences. The clear north-south conflict on this issue reflects the interests of large traders in favor of having a flexible system – i.e. status quo. This illustrates that such an open and flexible process is beneficial to the major traders, as commented above.

An institutional change would hence be extremely difficult – new multilateral trade rules in itself is difficult, amendment of the decision-making rules seems almost impossible within the present political climate of the WTO. The easiest and probably the only way currently

---

<sup>153</sup> WTO Document WT/GC/W/477: *Preparatory Process In Geneva And Negotiating Procedure at Ministerial Conferences*, June 28, 2002.

to achieve a more effective, democratic, transparent, and fair decision-making process is by modifying the present procedures within the existing rules.

The existing flexibility of the WTO Agreement can be used to address a number of problems in the negotiation and decision-making processes. Changes in procedures within the existing rules are either way a good starting point when addressing these issues. Different procedures could be explored pragmatically. If a new practice is proven more effective than the existing, it could be extended to other areas. It would reveal the possible needs for a legislative change, and when adequate support is gained, it could be established formally.

It seems clear that within the existing institutional framework of the WTO, there must be flexibilities that facilitate the process of negotiating compromises among key nations and opponents. However, to conserve the democratic balance in these processes, clear and invariable guidelines should be established formally to provide transparency and predictability. A body that oversees and enforces these guidelines with a report-mechanism to the General Council should be established to ensure that the rules are followed.

## **1.6 Conclusion**

The WTO has become a powerful institution, changing national and international policies in a variety of issues. That such power is accompanied by adequate rules ensuring democratic, transparent and predictable procedures is imperative for its ability to deliver fair outcomes and preserve wide support in the long run. As mentioned in the introduction, there is an imbalance between the dispute settlement system and the political processes of the WTO in terms of efficiency and legitimacy.

Although Article IX of the WTO Agreement sets out a principle of secondary voting when consensus cannot be achieved, the decision-making practice of the Organization is almost exclusively based on consensus. This may disfavor developing countries in some decisions, as their strength in numbers would be more advantageous under a voting model. However, if voting was widely employed, the wish to obtain a more favorable result in the voting

round could undermine the consensus model through proliferation of blocking. After all, consensus is in principle a democratic way of reaching decisions.

The practice of consensus increases the legitimacy of the decision-making process, as the minority cannot be outvoted and hence being forced to accept decisions. In addition, consensus facilitates ratification. The efficiency of WTO decision-making is, however, confined by the practice, as it is time-consuming and very sensitive to deadlocks. Legitimacy and efficiency are hence largely opposite considerations where an increase in one may lead to a decrease of the other.

Since the establishment of the WTO, both the internal and external transparency have been improved substantially through various measures. E.g. NGOs have been allowed to attend Ministerial Conferences, derestriction-periods have decreased, and the WTO web-site has become an important information-channel to both civil society and member governments. However, timely access should be provided for all documents unless weighty reasons are presented. Increased participation of NGOs is indeed a difficult issue without any simple solutions. Information diffusion to civil society and national governments, and monitoring the functioning of the WTO are among the pro's. The worries of developing countries in that increased access could further displace power imbalances due to the powerful lobbies and interest groups of developed countries, is a pertinent con. If further access should be allowed, stringent procedures for interaction between NGOs and the WTO members and staff must be established.

Single undertaking and cross issue linkage provide flexibilities in the negotiation-approach adapted to the political challenges of the issue at hand, which is often necessary to conclude negotiations successfully. However, issue-linkage can exacerbate power asymmetries within the WTO membership, as developing countries may have to sign agreements that do not serve their development objectives in order to obtain market access on preferential areas of trade. This approach should not further disadvantages to the participation and say of poor and small members in the negotiations. To ensure this, ground rules on allowed approaches and how they are to be employed should be established.

Although special and differential treatment measures increase the ability of developing countries to participate in negotiations and implement their WTO obligations, many are far from fully integrated into the world trading system. Further efforts should be made to ensure active participation and financial and technical assistance for implementation. The problems many developing countries face regarding active participation in negotiations and large costs of implementation is not and cannot be adequately resolved by financial and technical assistance. A more flexible approach regarding developing country commitments should be employed, and increased efforts should be made to facilitate enhanced market access and benefits from participation in the WTO.

Limited membership groups seem inevitable within the existing institutional structure of the WTO. However, in the Green Room consultations, developing countries are not only outweighed in terms of economic and political power, but also in numbers. There are no rules ensuring a democratic and fair composition, and no mechanisms for sharing the progress and outcome of the meetings with the rest of the WTO membership. Systematic exclusion of a majority of the membership entails a serious democratic problem. The role of such consultations should also be elaborated upon to prevent predetermination of issues. Establishing rules for the composition of key members on the issue at hand, and transferring progress and solutions to the membership, would give them a more legitimate character and prevent exacerbation of power imbalances.

An institutional reform of the WTO seems almost impossible within the current circumstances and political climate. The reluctance and disagreement have been made clear in several meetings.<sup>154</sup> Many countries have stated that they do not want changes to the institutional framework. It is however desirable, and should be persistently addressed and discussed in WTO fora. Until a sustainable solution is agreed upon, changes should be made to the current practices within the existing legal framework. These changes should be formalized and binding in order to prevent backtracking of achievements and the commitments made, as was illustrated in the aftermath of the Doha Declaration. On a limited scale, the plurilateral approach should be further explored and applied.

---

<sup>154</sup> See e.g. WTO Document WT/GC/W/477, *Preparatory Process In Geneva And Negotiating Procedure at Ministerial Conferences*, June 28, 2002.

## 2 Case: The TRIPs Agreement and Patent Protection on Pharmaceuticals

### 2.1 Introduction

Increasing competition from emerging and industrializing economies in Asia and Latin America on manufactured goods disadvantages American and European trading interests.<sup>155</sup> The intellectual property (IP) protection in developing countries was generally weaker than in the developed nations of North America and Europe, with limited scope, shorter period of protection, no patent-granting mechanisms for foreign right holders and weak enforcement.<sup>156</sup> Copies of products that were patent-protected in North America and Europe were produced on a large scale in several developing countries, and the right-holder who financed the innovation missed potential sales in foreign markets.

This problem was addressed in the Uruguay Round of negotiations (1986-1994). The solution that emerged both within the WTO and in the North American Free Trade Association (NAFTA), was harmonization of domestic regulations of the member states by setting out minimum requirements of intellectual property protection, facilitate patent-filing in foreign countries, and introduce border-measure obligations.

#### 2.1.1 The Concept of Intellectual Property

Intellectual property can be defined as information that has economic value when put into use in the marketplace.<sup>157</sup> More specific, intellectual property is a term for legal

---

<sup>155</sup> Trebilcock, Michael J. and Robert Howse (2005): *The Regulation of International Trade*, p. 397

<sup>156</sup> *Negotiating Health: Intellectual Property and Access to Medicines* (2006).

<sup>157</sup> Maskus, Keith E. (2000): *Intellectual property rights in the global economy*

entitlements attached to particular information, ideas, etc.<sup>158</sup> The patent-holder has various exclusive rights in relation to the subject of the IP. Patents provide the patent owner with legal means to prevent others from making, using, or selling the new invention for a limited period of time, subject to a number of exceptions.<sup>159</sup>

The rationale behind IP protection is that the research and development (R&D) leading to inventions and new products often is expensive, in particular within the area of pharmaceuticals which requires advanced science and technology. IP rights provide incentives for such activity, as investments in R&D can be reimbursed through the monopoly on the invention provided for by the IP protection. The degree of investment in R&D, and the innovation and technological progress as a consequence, will hence increase with the level of IP protection, as the economic incentives increase.

However, the temporary monopoly that IP protection provides, entails losses in consumer welfare. A high level of protection will affect the accessibility of inventions due to prohibitive prices, and the public benefits of R&D activities decrease. The optimal level of protection is therefore at a level which on the one hand provides R&D incentives that lead to technological progress, and on the other hand provides inventions affordable to most of its potential users. There is no simple solution when deciding on which level to apply, as the type of regulatory regime and the level of protection that is optimal, varies with a circumstances of the country in which it is applied.

The appropriate level of protection is dependent on the importance of innovation to the country's economy. If innovation is an important part of a country's economy, it is rational to provide a high level of protection, as it will stimulate and protect investment in these activities, and prevent free-riding. Developing countries have traditionally had a low level of protection due to limited purchasing-power and investment capacity, as well as technological competence. Diffusion of existing knowledge is hence desirable, which is facilitated through a low level of protection.

---

<sup>158</sup> Wikipedia: *Intellectual property*.

<sup>159</sup> WTO Fact Sheet *TRIPS and pharmaceutical patents*, p. 2

### 2.1.2 Intellectual Property in International Trade

IP were largely excluded under GATT, and there was no specific agreement on IP rights. However, Article XX of GATT 1947 provides a general exception to obligations for “measures ... necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those related to ... the protection of patents, trade-marks and copyrights, and the prevention of deceptive practices”. Such measures must, however, not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”. Measures otherwise inconsistent with the Agreement could hence be set out on exports and imports to promote compliance with intellectual property rights.

Intellectual property was one of the new issues included in the Uruguay Round (1986-1994). IP rights have traditionally been a matter of domestic regulation. The TRIPs Agreement was the first time IP rules were incorporated in the international trading system. It illustrates the “behind the borders” tendency of the WTO regulatory regime, where the WTO imposes obligations on domestic regulation and hence confines the regulatory options of national policymakers. This tendency is sometimes referred to as externalization of domestic regulation.<sup>160</sup>

The negotiations of the TRIPs Agreement had a clear North-South confrontation, as developing countries traditionally have little or no IP protection, both in terms of narrow scope and short period of protection.<sup>161</sup> Article II (1) provides that “[n]ationals of any country of the Union shall, as regards advantages that their respective laws now grant, or may hereafter grant to nationals”. The TRIPs Agreement deals with a variety of IP rights, including patents on pharmaceuticals. The Agreement sets out the minimum patent protection period to 20 years, and was reluctantly accepted as a part of the Single Undertaking.<sup>162</sup>

---

<sup>160</sup> See e.g. Science Communication, Vol. 17, No. 2, 137-162 (1995)

<sup>161</sup> *Negotiating Health: Intellectual Property and Access to Medicines* (2006).

<sup>162</sup> TRIPs Article 33



### 2.1.3 Counterfeit Drugs

The world is facing an immense problem regarding counterfeit medicines. Most counterfeits are substandard pharmaceuticals which are manufactured below established standards of safety, quality and efficacy.<sup>163</sup> Counterfeiting can apply to both branded and generic products. The term “counterfeit medicines” refers to products with the correct ingredients but fake packaging, with wrong active ingredients, without active ingredients, or with insufficient active ingredients.<sup>164</sup> Most counterfeits contain incorrect level of the drug’s active ingredient, resulting in increased likelihood of drug resistance.<sup>165</sup>

For people infected by wide-spread infectious diseases such as malaria, tuberculosis and HIV/AIDS, drug resistance has catastrophic consequences as new drugs must be developed to treat the resistant strain. A 2004 study estimates that 85 percent of malaria drugs in Nigeria are ineffective.<sup>166</sup>

One of the important functions of patent-protection is to prevent counterfeits. But herein lies a dilemma: If the IP protection on pharmaceuticals was decreased and cheap generic version were made available, the counterfeit market would not be as competitive on price as currently is the case. The TRIPs Agreement attempts to address this issue also through provisions on border measures requirements [section 4].

### 2.1.4 Access to Medicines in Developing Countries

Most developing countries have little technical and innovative capacity, which is also reflected in their level of protection prior to the TRIPs Agreement. However, they largely bear the costs of implementation as the standards set out in the TRIPs agreement are largely in accordance with the systems established in most of the developed world. The obligations on patent protection is hence costly to developing countries both implementation-wise and

---

<sup>163</sup> See WHO fact-sheet, available at:

<http://www.who.int/mediacentre/factsheets/fs275/en/> (11.02.2006)

<sup>164</sup> Ibid

<sup>165</sup> WHO (2006): *Public health: Innovation and intellectual property rights*, p. 174

<sup>166</sup> The American Council of Science and Health: “Counterfeit Drugs: Coming to a Pharmacy Near You”

because medicines are becoming more expensive due to patent protection and demands for remuneration from generic producers.

In the Uruguay Round, pharmaceutical companies claimed that their R&D activities are handicapped because of the lack of IP protection in developing countries.<sup>167</sup> This rhetoric is largely flawed, as the bulk of the population in most developing countries does not have sufficient economic capacity to buy patent-protected medicines. Only ten percent of the population in Africa infected with HIV/AIDS have access to ARV treatment.<sup>168</sup> Mostly, the reason has been prohibitive prices: until the patent expired, the price on one year of ARV treatment was some \$10,000.<sup>169</sup> Developing country-specific drugs such as malaria treatment do not provide the same research and development incentives as medicines with a “western market”, as the purchasing power of developing country citizens is significantly lower. Drug-resistance against existing treatments for these kinds of diseases is therefore particularly devastating.

The TRIPs Agreement attempts to strike a balance between private and public interests.<sup>170</sup> The TRIPs Agreement has, however, been widely criticized for giving priority to private patent holders over public health.<sup>171</sup>

The core inquiry in this chapter is the impact of the TRIPs Agreement on the access to affordable pharmaceuticals in developing countries. One third of the world’s population does not have regular access to affordable medicines, and 95% of people with HIV/AIDS do not have access to antiretroviral treatment.<sup>172</sup> Further, infectious diseases kill more than 10 million people each year, 90 percent of whom are living in developing countries.<sup>173</sup>

---

<sup>167</sup> *Negotiating Health: Intellectual Property and Access to Medicines* (2006).

<sup>168</sup> Pan American Health Organization (2005): *More Progress on Drug Prices*. Paragraph 7.

<sup>169</sup> MSF (2003): *Doha Derailed: A Progress Report on TRIPS and Access to Medicines*, p. 7.

<sup>170</sup> WTO Fact Sheet (2006): *TRIPS and pharmaceutical patents*, p. 1,

<sup>171</sup> Joint NGO Statement on the Special Discussion in the WTO TRIPS Council on Patents and Access to Affordable Medicines. *Patents and Medicines: The WTO Must Act Now!*

<sup>172</sup> *The WTO and Developing Countries* (2004) p. 147

<sup>173</sup> WHO (2001): *The World Health Report 2001*, p. 144

There are a variety of obstacles to providing the population in developing countries with essential medicines: Logistical supply and storage problems, substandard drug quality, inappropriate selection of drugs, wasteful prescription and inappropriate use, inadequate production, prohibitive prices and lack of financing for health care.<sup>174</sup> In many cases, however, prohibitive prices is the main barrier.<sup>175</sup> There are two main methods in the TRIPs Agreement for dealing with the health crisis in poor countries: Compulsory licencing and parallel imports. Both methods enable lower prices on pharmaceuticals, and may hence increase access.

“Generic drugs” or “generics” are terms used for copies of patented drugs, which are often sold at a lower price under the name of the chemical ingredient of the drug.<sup>176</sup> Under a compulsory license, a country may on certain conditions produce a generic version of patented drug to supply the domestic market, i.e. an exception from the patent right. However, many developing countries do not have technology or size of market to manufacture affordable generic versions.<sup>177</sup> They are hence dependent on importing generic versions.

The impact of generic competition on the price of first-line AIDS triple therapy has been documented by Médecins Sans Frontières. When the patent-protection expired in 2000, generic competition lowered the prices substantially. The original price was \$10439 annually. After less than four years of generic competition, the price on the originator was \$562, while some generic copies were down to \$168. This clearly illustrates the impact of patent protection on pharmaceutical prices.<sup>178</sup>

Drug-resistant strains of tuberculosis, malaria and pneumonia are spreading, and the resistance entails a great need for new medicines.<sup>179</sup>

---

<sup>174</sup> MSF (2005): *TRIPs, R&D and access to medicines: A Guide to the Post 2005 World*, p. 1

<sup>175</sup> Ibid

<sup>176</sup> Wikipedia: *Generic drug*.

<sup>177</sup> Hoen, Ellen ‘t (2003): *Pharmaceuticals: Patents, Prices and Patients*, paragraph 11

<sup>178</sup> MSF: *Doha Derailed: A Progress Report on TRIPs and Access to Medicines*, p. 3

<sup>179</sup> WHO: *Drug-Resistant Strains of TB Increasing Worldwide*. WHO/19

One of the core demands of developing countries, health agencies and NGO's in the Doha Round of negotiations has been to open for such export in order to make generic drugs accessible and affordable in developing countries.<sup>180</sup> These demands were largely agreed upon in the Declaration on TRIPs and Public Health in 2001.<sup>181</sup>

First, TRIPs provisions on patent protection will be accounted for. Further, exceptions from the protection requirements that could provide for cheaper medicines will be discussed. Finally, recent developments regarding these provisions will be addressed.

## **2.2 TRIPs and Patent Protection on Pharmaceuticals**

In the following analysis of the rules on patent protection, it is important to bear in mind that the scope of options within a particular country not only can be limited by the WTO framework, but also might be - and often is, subject to further restrictions by bilateral and regional trade agreements, but not least national legislation. The TRIPs Agreement only sets out minimum standards that the members have to comply with. Each member can determine the level of protection within these boundaries, and can hence establish a stronger protection of patents. For members to use the exception-mechanisms provided for in the TRIPs Agreement, they also have to be provided for in national law.

### **2.2.1 Deadlines for Implementation of TRIPs Obligations**

In accordance with Article 65 (1) of the TRIPs Agreement, developed country members shall comply with the obligations of the agreement by 1996. For developing country members, the agreement goes into effect in 2000 [Article 65 (2)], but with an additional period of five years on areas for which countries that had not granted patents when the TRIPs Agreement entered into force in 1995 [Article 65 (4)]. LDCs had initially until 2006

---

<sup>180</sup> See e.g. the NGO joint statement signed by 135 organizations: *Patents and Medicines: The WTO Must Act Now!*

<sup>181</sup> WTO Document WT/MIN(01)/DEC/2: *Declaration on the TRIPs Agreement and Public Health*, November 20, 2001

to comply [Article 66 (1)], but the Doha Declaration on TRIPs and Public Health paragraph 7 extended the transition period for enforcement of pharmaceutical patents until 2016. LDCs were also given a general extension of the transition period under Article 66 (1) from 2005 until July 1, 2013.<sup>182</sup> All member countries except LDCs shall now hence be TRIPs compliant.

## 2.2.2 TRIPs Provisions on Patent Protection

The TRIPs Agreement Articles 27-34 contains the provisions on patent protection. Article 27 (1) provides that patents shall be available for any inventions, including both products and processes. It is hence not only the pharmaceuticals themselves that can be subject to protection, but production processes may also be. The minimum period of patent protection is twenty years [Article 33].

Member countries are required to respect foreign patents filed in their country, and can hence not produce generic versions without using the mechanisms provided for in TRIPs. The so-called mailbox rule in Article 70 (8) provides interim legal procedures for receiving post 1995 patent applications during the period of transition. When full implementation of TRIPs obligations is achieved in accordance with the transition deadlines described above, patents are back-dated to the date of filing, providing protection for the invention in the remainder of the patent period.

Inherent to patent rights is the granting of exclusive rights for the patent holder. The exclusive rights are outlined in Article 28, and require patent holders to be given legal powers to prevent third parties from making, using, offering for sale, selling, or importing a protected invention without the right-holders consent.

However, these rights are not absolute. A number of exceptions to the exclusive rights are provided for in the TRIPs Agreement. Articles 27 (2) and (3) provide exceptions for certain inventions in which the members may exclude from patent protection. Articles 27 (2)

---

<sup>182</sup> WTO Document IP/C/40: General Council Decision of November 29, 2005.

provides that “[m]embers may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* ... including to protect human... health..., provided that such exclusion is not made merely because the exploitation is prohibited by their law”. Note that the term “may” allows but does not mandate such exceptions. “Ordre public” is a term derived from French law, and relates to matters that threaten the structure of the civil society.<sup>183</sup> This paragraph may be interpreted as a general public health exception. It is, however, interpreted narrowly. It applies to inventions that themselves are harmful to *ordre public*,<sup>184</sup> which might e.g. be a patent for an invention whose purpose is illegal activities.

Another exception that might seem to provide a limitation on the scope of the patent protection that could be used for public health purposes is Article 30. Three cumulative conditions must be met to qualify: (1) the exception must be “limited”, (2) the exception must not “unreasonably conflict with a normal exploitation of the patent”, and (3) the exception must not “unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties”. In WTO disputes, the provision has been interpreted stringently. In *Canada – Pharmaceutical Patents*,<sup>185</sup> Article 30 was found to permit governments to allow research on patented pharmaceuticals, and manufacturers of generics to produce a patented drug to obtain regulatory approval in order to introduce their generic version on the market as soon as the patent has expired – the so-called “regulatory review exception”. Otherwise, the protection would de facto be more than the fixed period of patent protection, as the stringent requirements for regulatory approval of new pharmaceuticals would lead to a significant delay of the introduction of generics in the market.

Production of the patented drug to stockpile it for sale in the post-expiry market, the so-called “stockpiling exception” in the Canadian Patent Act, was however not found to conform to Article 30. This was due to the term “limited exceptions” in Article 30. The term “exceptions” implies derogation from the main rule, which by nature is limited. The

---

<sup>183</sup> See UNCTAD Document CY564-Unctad-v1, Chapter 19, p. 375, November 29, 2004

<sup>184</sup> WTO: *Overview: the TRIPS Agreement*, para. 8.

<sup>185</sup> WTO Document WT/DS114: *Canada – Patent Protection of Pharmaceutical Products*, March 17, 2000

panel stated that “[t]he term ‘limited exceptions’ must therefore be read to connote a narrow exception – on which makes only a small diminution of the rights in question.”<sup>186</sup> The stockpiling exception that was provided for in the Canadian Patent Act was not found to be a limited exception, as it “constitutes a substantial curtailment of the exclusionary rights” provided for in Article 28 (1) of the TRIPs Agreement. Generic manufacturers will hence not be able to enter the market on the day of the patent-expiry because they first have to manufacture a sufficient stock of goods.

In conclusion, Article 30 does not, in light of the Canada – Pharmaceuticals Patents case, seem to have a sufficient scope to cover exceptions that could make possible generic production in the protection period in order to make affordable drugs available in developing countries. The precedent of the case does not control future panels (see paragraph 6 of the introduction). Although not very likely, Article 30 of the TRIPs Agreement, in light of the Doha Declaration on TRIPs and Public Health, could be interpreted differently in future cases.

### 2.2.3 Compulsory Licencing

Article 31 of the TRIPs Agreement confines the extent to which the members may authorize use of patented inventions without authorization of the right holder. It is an exception from the rights of the patent-holder provided for in Article 28, and allows compulsory licencing and government use of patented pharmaceuticals. Compulsory licensing is use of a patent-protected invention on the permission of the government “without the authorization of the right holder”. It hence allows manufacturers of generic drugs, on specific terms set out in Article 31, to use a patented invention without the patent holder’s permission. The domestic laws of the members that allow such use must conform to a number of conditions in order to protect the interests of the patent holder.

First of all, the party applying for a compulsory license must have made attempts to obtain a voluntary license from the patent-holder on “reasonable commercial terms” over a

---

<sup>186</sup> *Canada – Patent Protection of Pharmaceutical Products*, paragraph 7.30

“reasonable period of time” without success [Article 31 (b)]. In the case of “national emergency or other circumstances of extreme urgency or in cases of public non-commercial use”, however, this requirement may be waived. In the anthrax case in the US and Canada in 2001, it was evident that the definition of “national emergency” is very unclear.<sup>187</sup>

In any case, if a compulsory license is issued, the patent holder shall be paid “adequate remuneration, taking into account the economic value of the authorization” [Article 31 (h)]. Further, the authorization must be considered on an individual basis [Article 31 (a)], the license must be non-exclusive; the patent holder can continue its production [Article 31 (d)], and the scope and duration of such use is limited according to the purpose for which it was authorized [Article 31 (c)].

#### 2.2.4 Import under Compulsory Licencing

Article 31 (f) sets out a limit to the amount of export of drugs manufactured under a compulsory license: It must be “predominantly for the supply of the domestic market”. Developing countries that are not capable of producing generics or have insufficient domestic manufacturing capacities (e.g. due to lack of technical or financial resources), the amount that can be imported is effectively confined by the limits that Article 31 (f) place on the exporting countries. Recent developments on this issue will be discussed below.

#### 2.2.5 Parallel Import

A parallel import, also known as “grey product”, refers to a genuine product placed on the market in one country, which is subsequently imported into a second country without the permission of the owner of the intellectual property rights which attach to the product in the second country.<sup>188</sup> The price of the drug in the country from which it is imported is lower than in the country to which the drug is imported, and the drug can be sold at a lower price

---

<sup>187</sup> Modern Drug Discovery (2002): *Infringement of the public good?* May 2002 Vol. 5, No. 5, p. 41-45.

<sup>188</sup> Wikipedia: *Parallel import*.



than the manufacturers. With this method, developing countries are hence enabled to import medicines at the lowest prices available.

Parallel importing is particularly important to countries that do not have manufacturing capacity and therefore are not able to use the compulsory license method. In addition to lowering the price on patented pharmaceuticals, parallel import allows import of generic versions produced under compulsory license in other countries. In other words, compulsory licensing and parallel import can be used in combination.

The legal principle of parallel imports is exhaustion of rights, which means that when a patented product is sold legally, the patent-holder does not have the right to control further sale or exportation of the goods. Article 6 of the TRIPs Agreement confines the legal basis on which a dispute can be raised in the matter of exhaustion: None of the provisions of the TRIPs Agreement, except those dealing with non-discrimination, namely Articles 3 and 4, "shall be used to address the issue of the exhaustion of intellectual property rights" in a WTO dispute. Within these limits, exhaustion of IP rights is hence to be determined by each member. However, problems will most likely arise concerning the interpretation of the doctrine of exhaustion; whether domestic or international principles of exhaustion are to be applied.

The problem regarding Article 31 (f) – "predominately for the domestic market" - also applies to parallel import of compulsory licensed goods. For countries with no or insufficient manufacturing capacity, both methods provided for in the TRIPs Agreement that could be used to deal with the prices on pharmaceuticals are hence limited by this rule.

### **2.3 The Declaration on the TRIPs Agreement and Public Health**

The Declaration on the TRIPs Agreement and Public Health, adopted on the fourth Ministerial Conference in Doha on November 14, 2001, is an authoritative interpretation of the TRIPs Agreement in accordance with Article IV (2) of the WTO Agreement. The

declaration was stated to be a historic achievement.<sup>189</sup> Paragraph 4 states that the TRIPs Agreement “does not and should not prevent Members from taking measures to protect public health ..., in particular, to promote access to medicines for all”. The declaration hence aims to provide flexibility for such purposes in the interpretation of the TRIPs Agreement.

Specific interpretive flexibilities are provided for in Article 5 of the declaration. First, it is emphasized that the object and purpose of the TRIPs Agreement shall be guiding in interpretive issues [Article 5 (a)]. This is a well known principle in treaty interpretation, and is provided for in Article 31 (1) of the Vienna Convention on the Law of Treaties.<sup>190</sup> However, read in the light of paragraph 4, it incorporates public health considerations into the object and purpose of the agreement, thereby establishing a more dynamic interpretation to stress public health considerations, setting out an interpretive baseline of the TRIPs Agreement in public health issues.

Further, particular interpretive issues regarding public health are provided for: “Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted [Article 5 (b)]. The members can hence choose the grounds upon which compulsory licences shall be issued; it is a matter of national discretion.

Article 5 (c) clarifies the exception in Article 31 (b) of the TRIPs Agreement on “national emergencies and other situations of extreme urgency”, which permits members to waive the requirement of negotiations with the patent-holder on a voluntary licence before a compulsory license may be issued. It does not only include emergencies where time is crucial, but also long-lasting health emergencies that ravage several developing countries: “Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a

---

<sup>189</sup> WHO (2001): Statement WHO/18, November 15, 2001

<sup>190</sup> The Vienna Convention on the Law of Treaties of May 23, 1969

national emergency or other circumstances of extreme urgency”. However, the freedom to determine what constitutes a national emergency is effectively confined by the TRIPs Agreement Article 31 (b), because a “national emergency” is a specific example of “circumstances of extreme urgency”. The national emergency definition must therefore satisfy the “extreme urgency” requirement. The “right” provided in Article 5 (c) of the Declaration is hence of limited significance.

Paragraph 5 (d) of the Declaration provides that “each Member [is] free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4”. The members can determine that the patent-holders right shall be exhausted after the first sale, but such a practice must be exercised non-discriminatory: the domestic regime determining exhaustion of intellectual property rights cannot discriminate between local and foreign patent holders. Article 6 of the TRIPs Agreement shall hence not an obstacle to parallel import of pharmaceuticals.

### 2.3.1 The Legal Status of the Declaration

The Doha Declaration on TRIPs and Public Health<sup>191</sup> is a so-called authoritative interpretation. According to the WTO Agreement Article IX (2), the Ministerial Conference and the General Council have exclusive authority to adopt interpretations of WTO Agreements. Ministerial declarations are, however, not legally binding.

It might be argued that for the interpretive authority delegated to the Ministerial Conference in accordance with Article IX (2) of the WTO Agreement to be efficient, such interpretive decisions should have legal force. The principle of sovereignty in international law, however, effectively limits the ways by which states can accept obligations.

The clarity of the provisions is also of significance. Ambiguity opens for a variety of interpretive approaches, and would weaken the persuasive authority of the declaration. They would hence be vulnerable to narrowing interpretations.

---

<sup>191</sup> WTO Document WT/MIN(01)/DEC/2

The Doha Declaration constitutes softlaw with substantial authority. It builds political pressure on the members to comply, but that is also how far it goes. Powerful nations can resist such pressures, which they will when the opposing interests are sufficiently strong. The US Trade Representative's fact sheet refers to the Declaration on TRIPs and Public Health as a political declaration, and in accordance with the "spirit" of the declaration, it is interpreted as covering pandemics.<sup>192</sup>

In case of contradiction with rules "expressly recognized by the parties", the declaration would probably be interpreted narrowly or set aside/suspended. However, the declaration does not have any visual contradictions. Ministerial Declarations do not have legal relevance in terms of a legal source that panels and the Appellate Body are legally obligated to consider. However, they can and should be considered. The Doha Declaration has great persuasive authority in the interpretation of the TRIPS Agreement in the event of a dispute.

### 2.3.2 Implications of the Declaration

The declaration fails to clarify key terms such as "public health", and although the members can decide what constitutes a national emergency or other circumstances of extreme urgency, the scope of the declaration is largely left open for narrowing interpretations that could limit many of the commitments made. As described below, fierce opposition from developed countries with economic interests in pharmaceutical companies such as the US, Canada, Switzerland and Japan, has subsequently led to several attempts of backtracking on the Doha promises.

Although Article 31 allows members to issue compulsory licences to third parties, the so-called paragraph 6 issue remains unsolved. This despite the great political willingness demonstrated in the declaration; it illustrates how controversial the compulsory license issue is, in particular the ability to import medicines produced under compulsory licences.

---

<sup>192</sup> USTR (2001): *Fact Sheet Summarizing Results from WTO Doha Meeting*, November 15, 2001

Developed countries and the pharmaceutical companies fear reduced profits if generics produced under compulsory license could be imported by all countries with insufficient manufacturing capacity. The main worry is that generics might be diverted to countries where the patent is protected, and thereby undermine the mechanisms ensuring restitution of R&D investments, and, of course, profits.

Article 6 of the declaration, however, provides that the countries lacking manufacturing capacities “could face difficulties in making effective use of compulsory licencing under the TRIPs Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002”. As Article 6 carefully insinuates, many developing countries will not be able to take advantage of the compulsory license method without a solution to the Article 31 (f) problem, as they cannot issue licences to manufacturers based in other countries, nor import from other members.

Finally, Article 7 instructs the TRIPs Council<sup>193</sup> to grant LDC’s an extended deadline for implementation and application of Sections 5 and 7 of the TRIPs Agreement with respect to pharmaceuticals, namely “Patents” and “Protection of Undisclosed Information”, until January 1, 2016. This was set out by decision of the TRIPs Council of June 27, 2002.<sup>194</sup>

Although the declaration is not legally binding, it provides an interpretive baseline for the conflicting interests in the TRIPs Agreement, namely those of the patent-holder (R&D incentives) and the public health crisis. Even though it does not control the interpretation of the TRIPs Agreement, it might be an element in the interpretation that could provide for a more fair determination of the contesting interests. If the members choose to accommodate the public health issues provided for in the declaration in future cases and commitments within the area, the declaration could lay the ground for a fairer and more defined legal

---

<sup>193</sup> According to Article 68 of the TRIPs Agreement, the Council for TRIPs “shall monitor the operation of this Agreement and, in particular, Members’ compliance with their obligations hereunder” and “carry out such other responsibilities as assigned to it by the Members”.

<sup>194</sup> WTO Document IP/C/25: “Extension of the transition period under Article 66.1 of the TRIPS Agreement for least-developed country Members for certain obligations with respect to pharmaceutical products”

framework, ensuring poor countries the right to attend to their public health issues in an effective and predictable manner.

## 2.4 The Paragraph 6 Issue

As provided for in Article 6 of the Doha Declaration on TRIPs and Public Health, the TRIPs Council was instructed to find an “expeditious solution” to the issue regarding countries with insufficient or no manufacturing capacities to be able to use the compulsory licencing exception effectively. Thereof called the paragraph 6 issue. The deadline set out in paragraph 6 was the end of 2002.

A block of developing country governments proposed to grant developing countries the same rights to affordable medicines as developed countries, because countries with no or insufficient manufacturing capacity cannot produce generic medicines at all or only in a limited scale, and import is largely confined by Article 31 f.<sup>195</sup> This constitutes a double standard between rich and poor countries with regard to access to medicines. They hence recommended lifting the restrictions on export of generic medicines through an authoritative interpretation<sup>196</sup> of Article 30 of the TRIPs Agreement.<sup>197</sup>

Article 30 allows limited exceptions from the exclusive patents, and the recommendation proposed that the exception is written into national law so that the generic producers could respond to requests or compulsory license from an importing country.<sup>198</sup> According to the proposition, the authoritative interpretation should not be restricted to particular diseases or countries. This was backed by the WHO and most developing countries, in particular the African Group consisting of all African member-countries. The same approach was recommended by the European Parliament as amendment to the EU Medicines Act.<sup>199</sup>

---

<sup>195</sup> WTO Document IP/C/M/33

<sup>196</sup> Article IX (2) of the WTO Agreement

<sup>197</sup> WTO Document IP/C/M/33

<sup>198</sup> Ibid

<sup>199</sup> European Parliament, Resolution 196

A counter-offensive was initialized by large pharmaceutical companies and their governments, wanting a temporary waiver to be restricted to HIV/AIDS, malaria, and similar epidemics, and only applied to truly disadvantaged countries, such as in Sub-Saharan Africa.<sup>200</sup>

The Article 30 approach was rejected by the EU and US. The US wanted a waiver for disputes involving compulsory licensing for export. Temporary, legal uncertainty. EU: amendment to TRIPs, exception to compulsory licensing restrictions on export for pharmaceuticals. But the legal mechanism demanded compulsory licences to be issued in both the exporting and the importing country. The importers would be dependant on the political will in the countries with generic exporters – administrative burden and wouldn't provide necessary economic incentives and uncertainty for the generic manufacturers. In addition, these proposals included many new safeguards to remedy the fear of diversion of generic exports to developed country markets. Industrial concerns. They also advocated restrictions to particular diseases and countries, which would result in limited coverage.

#### 2.4.1 The 2002 Deadlock

During the negotiations on the paragraph 6 issue, several attempts were made to curtail developing countries' access to generics, reneging the commitments of the Doha Declaration on TRIPs and Public Health. Largely, the attempts were made or supported by countries hosting large pharmaceutical companies, including the US, EU, Canada, Switzerland and Japan. For instance, the scope was limited by setting a list of diseases covered, most for which patents are not a barrier: For most of the covered diseases there was either no treatment or the patent-protection of the treatment had expired.<sup>201</sup> In other words, compulsory licensing would be applicable only for a limited number of the diseases covered.

---

<sup>200</sup> WTO Document IP/C/M/33

<sup>201</sup> Moran, Mary (2003): *Reneging on Doha: An MSF Analysis of recent attempts to restrict developing countries' use of compulsory licensing to a set list of diseases*, p. 2.

On December 16, 2002, the Chairman of the TRIPs Council submitted a proposal for an interim solution to the paragraph 6 issue, the “Motta text”.<sup>202</sup> The proposal allowed export of generics to developing countries, but the conditions on manufacturing capacity were ambiguous, which implies a lack of predictability of future interpretation on such a controversial issue. E.g. each country had to “establish” that it does not have sufficient manufacturing capacity [paragraph 2 (a)(ii)], and the exporting member could manufacture “only the amount necessary to meet the needs” of the importing country. It further required both the importing and the exporting country to issue compulsory licences. The proposal did, however, not restrict the scope of diseases covered.

The US blocked adoption of the proposal due to the scope of diseases,<sup>203</sup> insisting on limitations to HIV/AIDS, malaria, and other infectious epidemics. On December 20, the US trade representative Robert Zoellick stated that such a focus on infectious diseases would reflect the original intentions of the Doha Declaration.<sup>204</sup> The US made a last minute attempt to limit the range of medicines by inserting a footnote,<sup>205</sup> but this was rejected by most developing countries. The representative of Kenya speaking on behalf of the African Group stated that the proposed footnote would be “redefining and limiting the scope of public health problems”.<sup>206</sup>

The 16 December deadline passed in deadlock, with the US alone vetoing the proposed solution. The US was subsequently alleged of being controlled by its powerful pharmaceutical lobby and unreasonable fear of cheap generics being diverted to rich country markets. In an open letter to the WTO delegates, CPTech, Oxfam, MSF and HAI urged them to reject the “Motta text”, concluding that “the 6 December 2002 Motta text would allow countries to export some medicines to least developed countries, and to a very

---

<sup>202</sup> WTO Document JOB(02)/217

<sup>203</sup> WTO Document IP/C/M/38: *Minutes of November and December 2002 meetings of the TRIPs Council*, paragraphs 33 and 34

<sup>204</sup> WHO (2003): Bulletin of the World Health Organization, vol. 81, No. 2, p. 1.

<sup>205</sup> Ibid

<sup>206</sup> WTO Document IP/C/M/38 paragraph 36



small number of developing countries that meet the severe test set out in the proposed Annex on manufacturing capacity”.<sup>207</sup>

#### 2.4.2 The Interim Waiver

In early 2003, new initiatives for a compromise were launched by the EU, Japan and TRIPs Council Chairman, trying to get the US onboard.<sup>208</sup> These were rejected by developing countries due to further limitations such as a fixed list of diseases, limits on eligible countries, and restriction to emergency situations.<sup>209</sup> The Chairman launched a “statement of understandings” on February 5, 2003, in a new attempt to get the 16 December “Motta text” adopted.<sup>210</sup> According to the “understanding”, the solution would be limited to “national emergencies or other circumstances of extreme urgency”. Oxfam urged developing countries not to accept this solution, as “poor countries should not have to wait until a health problem has reached emergency proportions before being able to obtain affordable generic medicines”.<sup>211</sup>

The General Council reached a decision<sup>212</sup> on the issue, accompanied by a statement of the Chairman,<sup>213</sup> on August 30, 2003, less than two weeks before the Cancun Ministerial Conference. The decision attempts to remove limitations on exports under compulsory licenses to countries without sufficient manufacturing capacities. There are no restrictions to emergencies or circumstances of extreme urgency, or to specific diseases or countries.

---

<sup>207</sup> MSF (2002): *Letter from CPTech, Oxfam, MSF and HAI to WTO delegates regarding December 16, 2002 Chairman's Text for “solution” to Paragraph 6 of the Doha Declaration on TRIPS and Public Health*, December 19, 2002.

<sup>208</sup> WTO Document IP/C/M/39: *Minutes of TRIPs Council Meetings*, paragraph 58

<sup>209</sup> WTO Document IP/C/M/39: E.g. the representative of South Africa in paragraph 70

<sup>210</sup> CPTech: *Chairmans speech*.

<sup>211</sup> CPTech: *Patent Proposals Unacceptable, Rich Countries Wasting Developing Country's Precious Time, Says Oxfam*.

<sup>212</sup> WTO Document WT/L/540: *Decision on implementation of paragraph 6 of the Doha declaration on the TRIPs Agreement and Public Health: Decision of 30 August 2003*.

<sup>213</sup> WTO Document WT/GC/M/82: *General Council Chairperson's Statement*, November 13, 2003.

As discussed above, this was in accordance with the core demands of the developing countries.

The decision is an interim waiver based on the Motta proposal,<sup>214</sup> and remains in force until the TRIPs Agreement is amended [Article 11]. It is a waiver to the Article 31 (f) restriction, and allows members, on certain conditions, to export generic medicines made under compulsory licenses. All countries are eligible under the waiver [Article 1 (b)], but 23 developed countries have voluntarily announced that they will not use the system [note 3 to the decision], and 12 other countries have announced that they would only use it in emergencies.<sup>215</sup>

The waiver outlines requirements for both the exporting and the importing country. It allows countries producing generic copies of patented pharmaceutical products under compulsory licences to export the products to “eligible importing Members” [Article 2]. Definition of “eligible importing Member” is provided for in Article 1 (b): The term applies to “any least-developed country Member”, and “any other Member that has made a notification to the Council for TRIPS of its intention to use the system as an importer”. The notification requirement does hence not apply to LDC members, and notifications from other members do not have to be approved by the WTO [note 2]. Note that paragraph 2 sets out that Article 31 (f) of the TRIPs Agreement may only be waived “to the extent necessary”.

As commented above, the member must have “established that it has insufficient or no manufacturing capacities in the pharmaceutical sector for the product(s) in question” [paragraphs 2 (a)(i) and (ii)], and if the pharmaceutical is patented in its territory, it must have granted or intend to grant a compulsory license [paragraph 2 (a)(3)]. The importing member must further notify the Council of the name and expected quantity of the pharmaceutical(s) needed. Only the quantity notified to the Council may be manufactured

---

<sup>214</sup> WTO Document IP/C/W/405

<sup>215</sup> WTO Document Press/350/Rev.1: *Decision removes final patent obstacle to cheap drug import*, August 30, 2003, “The decision” paragraph 3.

by the exporting country, and the total production shall be exported to the notifying member(s) [paragraph 2 (b)(1)].

Finally, the eligible importing member shall take “reasonable measures” to prevent re-exportation [paragraph 4]. Developing- and least-developed country members may, however, according to the same paragraph, request assistance through technical and financial assistance from developed country members to facilitate the implementation of this provision.

The waiver outlines requirements for the exporting country to prevent diversion to developed country markets. As discussed above, diversion was one of the key worries of several developed countries in the negotiations. Firstly, products “shall be clearly identified as being produced under the system”, e.g. through specific labeling or marking [paragraph 2 (b)(ii)]. The exporting member shall notify the Council for TRIPs of compulsory licences granted under the system, and their conditions [paragraph 2 (c)]. The manufacturer must post on a website the quantities of export to each destination, and the “distinguishing features” of the products required by paragraph 2 (b)(ii) [paragraph 2 (b)(3)]. The exporting country must also pay compensation to the patent holder for the use of its patent [paragraph 3].

Finally, in accordance with paragraph 5, all members shall “ensure the availability of effective legal means” to prevent importation, sale and diversion of products produced under the system that are inconsistent with the provisions of the Declaration.

The statement of the General Council Chair, Carlos Perez del Castillo, which was attached to the Decision, is “designed to provide comfort to those who feared that the decision might be abused and undermine patent protection”.<sup>216</sup> The statement elaborates on some shared understandings of the members regarding interpretation and implementation of the Decision. Among others, it notes that the system established by the Decision shall be used “in good faith to protect public health”, and that “all reasonable measures should be taken”

---

<sup>216</sup> WTO Document PRESS/350, paragraph 18

to prevent diversion for which they are not intended. The legal relevance of the statement is limited, and may primarily serve as an interpretive guideline. Its limited significance was also mentioned introductory by the Chairman.

A focal point regarding the practical implications of the Decision is how “insufficient” manufacturing capacity will be interpreted. The definitions in paragraph 1 elaborates on the meaning of “pharmaceutical product”, “eligible importing Member”, and “exporting Member”, but the term “insufficient”, which is crucial to determine the scope of the waiver, is not defined. The ambiguity that the lack of this definition entails makes the scope of the Declaration vulnerable to narrowing interpretations. The controversial nature of the issue was probably prohibitive on this point.

A number of countries will need to adopt legal frameworks to make use of the decision. LDCs will, however, not be affected by the Decision until after their implementation deadline in 2016.

#### 2.4.3 The Amendment of the TRIPs Agreement

A decision on amendment of Article 31 of the TRIPs Agreement was made on 6 December 2005,<sup>217</sup> making the 2003 interim waiver permanent. It was the first time a core WTO agreement had been amended. The Protocol is open for acceptance until December 1, 2007, with possibilities for extensions if necessary.<sup>218</sup> In accordance with paragraph 3 of Article X of the WTO Agreement, the amendment enters into force for the member who has accepted it upon acceptance by two-thirds of the members. Until now, three countries have accepted the amendment, namely the US, Switzerland, and El Salvador.<sup>219</sup> The interim waiver from 2003 remains in force until then. For the remaining third that has not accepted the amendment when it enters into force, the 2003 waiver remains in force until acceptance.

---

<sup>217</sup> WTO Document WT/L/641

<sup>218</sup> WTO Document WT/L/641, paragraph 2 of the Decision

<sup>219</sup> WTO: *Countries accepting amendment of the TRIPS Agreement*.

The decision “directly transforms the 30 August 2003 ‘waiver’ into a permanent amendment” of the TRIPs Agreement, and is designed to match the 2003 Waiver as closely as possible.<sup>220</sup> This is to ensure that the “legal meaning and weight, and the hierarchy of provisions, are preserved as exactly as possible”, in order to avoid departing interpretations.<sup>221</sup> Also the procedures are matched, including statement by the General Council chairperson.<sup>222</sup>

The new Article 31 “bis” (additional article after Article 31) and its annex will be attached to the TRIPS Agreement when the protocol of amendment enters into force. An appendix to the Annex assesses how lack of manufacturing capacity in the importing country can be established. As discussed above, this was one of the shortcomings of the 2003 waiver. The appendix provides that LDCs are “deemed to have insufficient or no manufacturing capacities”. Other members must either establish that it (1) has no manufacturing capacities in the pharmaceutical sector; or (2) where the member has some capacity (excluding the capacity of or controlled by the patent holder), has examined this capacity and found it “insufficient for the purposes of meeting its needs”. Graduation appears when it is established that this is no longer the case. This appendix will be important to LDCs when they are to be TRIPs compliant in the pharmaceutical sector in 2016. It may seem like establishing insufficient manufacturing capacity for other members is on their own discretion. Other members may, however, in accordance with the Chairman's statement, challenge the establishment of insufficient capacity, as any member may bring “any matter related to the interpretation or implementation of the amendment ... to the TRIPS Council for expeditious review” [third section of the statement]. The statement requires notifications to outline how insufficient or no manufacturing capacity have been established. This is allegedly to avoid controversy.

The administrative burden on the TRIPs Council set out through the amendment is substantial. How the TRIPs Council will handle such requests is indeed of great importance

---

<sup>220</sup> WTO Document Press/426, December 6, 2005

<sup>221</sup> Ibid

<sup>222</sup> WTO: *Chairperson's statement, December 2005.*

to the scope of the amendment, as the ambiguity of the manufacturing capacity rules probably will spur many conflicts on the interpretation.

## 2.5 Conclusion

Without patent protection on medical discoveries, incentives to develop new medicines for pharmaceutical companies would largely disappear. R&D activities would then largely depend on public funding. Harmonized intellectual property regulation through the TRIPs Agreement ensures a high level of R&D activities, removes obstacles to trade, and facilitates competition. The compromise between private interests and public health when deciding on the appropriate level of protection in the TRIPs Agreement should particularly focus on the impact on developing countries. Private actors must have adequate economic incentives to develop new medicines. This is particularly important to developing countries, as the development of resistant types of prevalent diseases has proliferated in the last years, partly due to a proliferation in the counterfeit market.<sup>223</sup>

However, dissenting interests must also be given weight when the level of IP protection shall be determined. Public health and biodiversity considerations should not be outweighed by the need for rapid technological advance and protection of business interests. The patent regime set out in the TRIPs Agreement provides an effective global monopoly for inventions by setting the minimum of protection period to 20 years and enabling filing of patents in all member countries. Compulsory licencing does hence play a vital role both as a negotiating tool to lower the prices on patented drugs produced by the patent owner (e.g. the US - Anthrax case), and to allow generic production and import in the patent period to make sufficient amounts of medicines available in national health emergencies and long-lasting epidemics.

The political willingness early in the Doha Round was substantial, and the declaration can largely be seen as an expression of that. Subsequently, several countries attempted to

---

<sup>223</sup> The American Council of Science and Health: “Counterfeit Drugs: Coming to a Pharmacy Near You”

renege the commitments made. This is an illustration of the problematic nature of such political declarations; the beneficiaries are depending on the good will of other members when the commitments are to be actualized. However, if such declarations were legally binding, the members would be very careful with making promises, but they would at least have more than persuasive authority.

The current solution to the paragraph 6 issue set out in the 2005 amendment, requires notifications, establishing insufficient manufacturing capacities, measures against diversion, granting compulsory licences in both the importing and the exporting country, and payment of compensation to the right-holder. This makes the system quite an administrative burden. Furthermore, the current solution cannot be used to promote long-term public health policies. Stockpiling of medicines for future use is not allowed; only real-time public health protection is hence provided for. This is in contradiction with the intentions and flexibilities that were provided for in the Doha Declaration on the TRIPs Agreement and Public Health, as the TRIPs Agreement “does not and should not prevent Members from taking measures to protect public health”. Competition in the generic manufacturing market is neither addressed in the decision. There is hence a need for a more substantial reform of the TRIPs Agreement than the 2005 amendment.

Two approaches could be used to provide TRIPs flexibility to meet public health needs:

(1) Maximum use of current public health safeguards and promotion of generic competition, as provided for in the Doha Declaration. This would, however, not remedy the systematic problems of the TRIPs agreement, as the TRIPs Agreement sets a floor, not a ceiling on IP protection. The increased public awareness on these issues over the last six years has not led to sufficient reforms.

(2) Reform TRIPs ground rules by providing greater flexibility in the period of patent protection, e.g. through geographical restrictions on patent protection (Lanjouw, 2002). The problem with this approach is that it is not likely to be politically feasible, the continuing reluctance until now considered.

The current health crisis in the developing world will not be solved by more flexible rules of IP protection, facilitation of generic import and competition in generic manufacturing, but it would be a vital and necessary contribution to this process.

## Conclusion

It is important to acknowledge that the WTO procedures, rules and agreements cannot only be adapted to the needs of disadvantaged members. Small and poor countries will always be vulnerable and face disadvantages in interaction with large and wealthy nations.

Developed countries account for some 70 percent of the trade within the WTO.<sup>224</sup> Their active participation in the WTO is imperative, also for the benefits of developing countries from participation in multilateral trade. This could be jeopardized if developing countries could outvote them in important matters, resulting in a further pursuit of bilateral and regional arrangements, in which developing countries would find themselves even more ill-equipped for participation as well as for influencing agreements and dispute settlement.

The legal framework of the WTO governing Ministerial Conferences has several democratic features, including the consensus principle, equal voting rights, transparency, participation, etc. However, these principles are general; their specific content is not elaborated upon in the legal framework of the WTO. This decreases the likeliness of the principles being followed in the practice of the Organization, as was illustrated in the preparatory processes of the Cancun Ministerial Conference.<sup>225</sup>

The WTO regulatory framework fails to set out rules and guidelines governing the political processes of the WTO that ensures predictability, transparency and overall fair outcomes. Ad hoc procedures improvised by powerful nations, and procedures adhered from the GATT largely lay the ground for large developed countries to shape procedures to their advantage. Thereof their resistance to the introduction of rules and guidelines.

The standard operating rules and practices and the lack of those, reflect and exacerbate the power inequalities within the membership of the WTO. Absence of accurate and invariable rules and procedures applied to the various processes in negotiations and decision-making makes room for improvisation in advantage of the powerful nations. The flexible feature of

---

<sup>224</sup> WTO: *Members and Observers*

<sup>225</sup> See chapter 1.3.1



WTO negotiations entails a significant lack of predictability to its members. The final agreements often contain ambiguous language that makes future interpretations and the actual scope of their commitments less predictable.

The negotiation and decision-making structures are not adapted to the increasing membership with its vastly different levels of development, as well as the scope and complexity of the issues covered. Because of flexible and informal structures, it does not ensure that no member has a fundamental objection on an issue when the decision is made. It is hence not the model itself but the way in which it is practiced in negotiations that constitutes a problem and makes many developing countries marginalized in the WTO. This exacerbation of power-imbalances should be corrected through establishment of precise and invariable rules. This could strengthen the political process, creating a balance between the dispute settlement procedure and the law-making of the WTO.

Efficiency and democratic legitimacy are indeed opposing considerations in any legal system. If the consensus principle was practiced in a more rule-based fashion, the democratic legitimacy of the WTO could increase, but the efficiency would probably be curtailed. Similarly, through extensive use of Green Room consultations and flexible procedures, the efficiency of WTO processes is increased, while the democratic legitimacy is decreased. As mentioned before, there is a growing need for international law-making due to the increase of international trade. Efficiency is therefore imperative if the WTO is to sustain its position as the main international institution governing multilateral trade, and for multilateral trade to be preferential to bilateral and regional arrangements, particularly in relation to major traders. The democratic features are on the other hand imperative for the ability of underdeveloped countries and emerging economies to attain continued development. Striking the appropriate balance could meet the needs of both, and strengthen the WTO and its multilateral approach.

There will always be imbalances in power relations in international institutions. However, the extents to which these imbalances are reflected in the proceedings and outcome of negotiations largely depend on how the processes for interaction are governed in its rules and practices. However, when this process is exercised among unequal parties of largely

different power and means of negotiation, it facilitates the ability of powerful countries to force small and poor countries to accept compromises that they otherwise would not have. This can be done by threats of withdrawing existing benefits such as financial assistance and aid, or offering bilateral carrots. Such consultations alleviate the process of reaching an agreement, but often at the cost of the interests of developing countries. The main point is to facilitate a negotiation process among unequal parties that attempts to balance the asymmetry rather than exacerbate it.

Participation in resource-intensive agreements, in particular those imposing “behind the border” regulatory policies, should be subject to cost-benefit analysis with regard to countries with a low level of development. Such agreements can to some countries threaten the overall beneficial effect of their participation in the WTO. The potential benefits of being party to an agreement should be weighed against the costs of implementation and adaption.

The consensus process of the WTO is characterized by informal and partly excluding consultations of which transparency and predictability is largely disregarded. This may exacerbate the conditions of the poor countries’ participation and influence in negotiations. Poor countries face impaired bargaining skills due to lack of participation caused by both resource-shortages and non-invitation to key negotiations. Further, the consensus model entail erosion of multilateralism follows the lacking efficiency and democratic abilities of the negotiation-structures. The imbalance between the judicial dispute settlement system and the flexible political processes of the WTO creates a lack of predictability.

The WTO membership should adopt a range of formal procedures ensuring an inclusive approach, enhancing the transparency and predictability of the WTOs law-making and decision-making processes. Formal rules could also facilitate the consensus process by preventing situations as was witnessed on the Cancun Ministerial Conference. Formal rules would give developing countries a greater say in the rule-making processes, and would hence enable greater benefits for developing countries from multilateral trade. Setting out such measures are, however, dependant on the support of major traders.

## Literature

### Books

- Bossche, Peter Van den (2005): *The Law and Policy of the World Trade Organization: Text, Cases and Materials*. Cambridge: Cambridge University Press
- De Carvalho, Nuno Pires (2005): *The TRIPS Regime of Patent Rights*. Hague: Kluwer Law International
- Gallagher, Peter (2005): *The First Ten Years of the WTO, 1995-2005*. New York: Cambridge University Press
- Hertel, Thomas W. and Alan L. Winters (2006): *Poverty & the WTO: Impacts of the Doha Development Agenda*. New York: Palgrave Macmillian
- Hoekman, Bernard M. and Michel M. Kostecki (2001): *The Political Economy of the World Trading System: The WTO and Beyond*. Second edition. New York: Oxford University Press Inc.
- Lowenfeld, Andreas F (2002): *International Economic Law*. New York: Oxford University Press Inc.
- Maskus, Keith E. (2000): *Intellectual property rights in the global economy*. Washington DC: Institute for International Economics
- Matsushita, Mitsuio, Thomas J. Schoenbaum and Petros C Mavroidis (2003): *The World Trade Organization: Law, Practice, and Policy*. New York: Oxford University Press
- Narlikar, Amrita (2005): *The World Trade Organization: A Very Short Introduction*. New York: Oxford University Press Inc.
- *Negotiating Health: Intellectual Property and Access to Medicines* (2006). Edited by Pedro Roffe, Geoff Tansey, and David Vivas-Eugui. London: Earthscan
- Peet, Richard (2003): *Unholy Trinity: The IMF, World Bank and WTO*. London: Zed Books Ltd.

- Petersmann, Ernst-Ulrich (2005): *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance*. New York: Oxford University Press
- Sell, Susan K. (2003): *Private Power, Public Law: The Globalization of Intellectual Property Rights*. Cambridge: Cambridge University Press
- Stiglitz, Joseph (2002): *Globalization and Its Discontents*. London: Penguin Books Ltd.
- Stiglitz, Joseph, and Andrew Charlton (2005): *Fair Trade for All: How Trade Can Promote Development*. New York: Oxford University Press
- *The WTO and Developing Countries* (2004): Edited by Homi Katrak and Roger Strange. New York: Palgrave Macmillan,
- Trebilcock, Michael J. and Robert Howse (2005): *The Regulation of International Trade*. Third edition. New York: Routledge
- Wallach, Lori and Patrick Woodall (2004): *Whose Trade Organization?* New York: The New Press
- *WTO at the Margins: Small States and the Multilateral Trading System* (2006): Edited by Roman Grynberg. Cambridge: Cambridge University Press

### **Journals**

- Abbott, Fred (2002): *The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO*. Journal of International Economic Law, 5 (2): 469-505
- Abbott, Kenneth W. (2001): Rule-making in the WTO. Journal of International Economic Law, 4 (2): 275-296
- Bossche, Peter Van den, and Iveta Alexovicová (2005): *Effective Global Economic Governance by the World Trade Organization*. Journal of International Economic Law, 8 (3): 667-690
- Bridges: Weekly Trade New Digest, Volume 6, number 18, May 15 2002
- Ehlermann, Claus-Dieter and Lothar Ehring (2005). *Decision-Making in the World Trade Organization*. Journal of International Economic Law, 8(1): 51-75.
- Gupta, Sanjeev and Yongzheng Yang (2006): *Unblocking Trade*. Finance and Development Vol. 43, No. 4

- Hoen Ellen 't (2003): *Pharmaceuticals: Patents, Prices and Patients*. United Nations Chronicle, Issue 2 2003  
<http://www.un.org/Pubs/chronicle/2003/issue2/0203p13.html> (11.09.2006)
- Howse, Robert (2005): *WTO Governance and the Doha Round*. Global Economy Journal: Vol. 5 : Iss. 4, Article 16. <http://www.bepress.com/gej/vol5/iss4/16>
- Isenberg, Daniel J. (1986): *Group Polarization: A Critical Review and Meta-analysis*. Journal of Personality and Social Psychology 50, pp. 1141-1511
- Jackson, John H. (2001): *The WTO 'Constitution' and Proposed Reforms: seven 'mantras' revisited*. Journal of International Economic Law, 4 (1): 67-78
- Kwa, Aileen (1998): *WTO and Developing Countries*. Foreign Policy in Focus, Volume 3, Number 37, November 1998  
<http://www.fpif.org/briefs/vol3/v3n37wto.html>
- Matthews, Duncan (2004): *WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: A Solution to the Access to Essential Medicines Problem?* Journal of International Economic Law, 7 (1): 73-107
- Narlikar, Amrita (2006): *Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO*. World Economy 29 (8): 1005-1029
- Narlikar, Amrita and Ngaire Woods (2001): *Governance and the Limits of Accountability*. International Social Science Journal: No. 170, November 2001
- Science Communication, Vol. 17, No. 2, 137-162 (1995)
- The International Centre for Trade and Sustainable Development: *Intellectual Property Rights*. Doha Round Briefing Series, Vol. 3 No. 5  
[http://www.ictsd.org/pubs/dohabriefings/Vol3/V3\\_05.pdf](http://www.ictsd.org/pubs/dohabriefings/Vol3/V3_05.pdf)
- Third World Economics: *Doha style democracy for WTO at Cancun?* No. 284, July 1-15, 2002
- WHO: *Deadlock on access to cheap drugs at global trade negotiations*. Bulletin vol. 81, No. 2  
<http://www.who.int/bulletin/News0203.pdf> (11.09.2006)

### Reports from International Organizations

- Médecins Sans Frontières (2003): *Doha Derailed: A Progress Report on TRIPS and Access to Medicines*. MSF Briefing for the 5th WTO Ministerial Conference, Cancún 2003, August 27, 2003  
<http://www.accessmed-msf.org/documents/cancunbriefing.pdf>
- Médecins Sans Frontières (2003): *Reneging on Doha: An MSF Analysis of recent attempts to restrict developing countries' use of compulsory licencing to a set list of diseases*. Mary Moran, May 2003  
<http://www.accessmed-msf.org/documents/renegingondoha.pdf> (11.06.2006)
- Médecins Sans Frontières (2005): *TRIPs, R&D and access to medicines: A Guide to the Post 2005 World*.  
<http://www.accessmed-msf.org/documents/guide%20to%20TRIPS.doc> (10.04.2006)
- Modern Drug Discovery (2002): *Infringement of the public good?* p. 41-45 Vol. 5, No. 5, May 2002
- Oxfam (2005): *Rigged Rules and Double Standards: Trade, Globalisation, and the Fight Against Poverty*. Chapter 9.
- UNESCAP (2005): *Economic and Social Survey of Asia and the Pacific*. Economic and Social Commission for Asia and the Pacific, April 25, 2005
- UNCTAD (2004): *Patents: Ordre Public and Morality*. Document CY564-Unctad-v1, Chapter 19
- UNCTAD (2006): *Exceptions to Patent Rights in Developing Countries*. August 2006
- UNCTAD Document CY564-Unctad-v1, Chapter 19, p. 375, November 29, 2004
- WHO (2001): *The World Health Report 2001*.
- WHO (2006): *Public health: Innovation and intellectual property rights*. April 2006.
- World Bank (2006): *World Development Indicators*.
- WTO Consultative Board (2005): *The Future of the WTO: Addressing institutional challenges in the new millennium*. (The Sutherland Report)

### Research Papers

- Blackhurst, Richard (2000): *Reforming WTO Decision Making: Lessons from Singapore and Seattle*. Stanford University Center for Research on Economic Development and Policy Reform, Working Paper No. 63  
<http://scid.stanford.edu/pdf/credpr63.pdf> (11.10.2006)
- Cottier, Thomas (2006): *Preparing For Structural Reform in the WTO*. World Trade Institute, Berne, September 26, 2006
- Levy, Philip I. (2004): *Do we need an undertaker for the Single Undertaking? Considering the angles of variable geometry*. Council of Economic Advisors, Washington
- Valentin Zahrt: The Discouraging Effects of Risks in the WTO, Garnet Working Paper Series: No 10/06, Germany, October 2006

### Internet Documents

- Abid Aslam: *Developing countries assail WTO 'dictatorship'*.  
<http://www.twinside.org.sg/title/deb6-cn.htm> (12.25.2006)
- American Council of Science and Health (2006): *Counterfeit Drugs: Coming to a Pharmacy Near You*. [http://www.acsh.org/publications/pubid.1384/pub\\_detail.asp](http://www.acsh.org/publications/pubid.1384/pub_detail.asp)
- Chakravarthi Raghavan (1999): *The Return of the "Green Room"*.  
<http://www.twinside.org.sg/title/green2-cn.htm> (12.02.2006)
- Chakravarthi Raghavan: *The WTO – an 'unruly' rule-based organization?*  
<http://www.twinside.org.sg/title/deb12-cn.htm> (12.17.2006)
- CPTech (2002): *Letter from CPTech, Oxfam, MSF and HAI to WTO delegates regarding December 16, 2002 Chairman's Text for "solution" to Paragraph 6 of the Doha Declaration on TRIPS and Public Health*. December 19, 2002  
<http://www.cptech.org/ip/wto/p6/ngos12192002.html>
- CPTech (2003): *Patent Proposals Unacceptable, Rich Countries Wasting Developing Country's Precious Time, Says Oxfam*. February 11, 2003  
<http://www.cptech.org/ip/wto/p6/oxfam02112003.html>
- CPTech: *Patent Proposals Unacceptable, Rich Countries Wasting Developing Country's Precious Time, Says Oxfam*. Press Briefing February 11, 2003  
<http://www.cptech.org/ip/wto/p6/oxfam02112003.html>

- CPTEch: *Chairmans speech*.  
<http://www.cptech.org/ip/wto/p6/motta02052003.html> (11.20.2006)
- Devaiah, Vishwas H (2004). *TRIPS and public health*.  
<http://www.altlawforum.org/PUBLICATIONS/document.2004-12-18.5846929564>  
(10.17.2006)
- Ellison, Minter (2005). *The Future of the WTO: Report by the Consultative Board to the WTO Director General*.
- Focus on the Global South – Geneva, “Comments on Cancun Draft Ministerial Text, August 25, 2003  
[http://www.nadir.org/nadir/initiativ/agp/free/wto/news/0825comments\\_cancun\\_draft.htm](http://www.nadir.org/nadir/initiativ/agp/free/wto/news/0825comments_cancun_draft.htm) (12.17.2006)
- Foreign Policy in Focus (2002): *WTO In Focus: What’s This Organization (WTO)*.  
<http://www.fpif.org/wto/struckture.html>
- Hoen, Ellen t’ (2003): *MSF calls on WTO to refuse ‘paragraph 6’ change*.  
[http://www.msf.org/msfinternational/invoke.cfm?component=article&objectid=2EA7AA16-950B-4E3A-9CB091725630F8E6&method=full\\_html](http://www.msf.org/msfinternational/invoke.cfm?component=article&objectid=2EA7AA16-950B-4E3A-9CB091725630F8E6&method=full_html) (01.04.2006)
- [http://en.wikipedia.org/wiki/Transparency\\_%28humanities%29](http://en.wikipedia.org/wiki/Transparency_%28humanities%29) (12.09.2006)
- Kohr, Martin: *Seattle reports*.  
<http://www.gene.ch/gentech/1999/Dec/msg00177.html> (12.09.2006)
- Lal Das, Bhagirath: *Why the Dicision-Making Practice of Consensus Works Against the South*. Chapter 5: Strengthening Developing Countries in the WTO.  
<http://www.twinside.org.sg/title/bgl3-cn.htm> (10.17.2006)
- Lamy, Pascal: *Leadership, the EU and the WTO*.  
[http://trade-info.cec.eu.int/doclib/docs/2004/september/tradoc\\_118804.pdf](http://trade-info.cec.eu.int/doclib/docs/2004/september/tradoc_118804.pdf) (01.04.2007)
- Pan American Health Organization (2005): *More Progress on Drug Prices*.  
[www.paho.org/English/DD/PIN/ptoday04\\_nov05.htm](http://www.paho.org/English/DD/PIN/ptoday04_nov05.htm) (01.09.2007)
- Raghavan, Chakravarthi: *The WTO – an ‘unruly’ rule-based organization?*  
<http://www.twinside.org.sg/title/deb12-cn.htm> (01.04.2006)
- The Third World Network (1999): *Seattle reports*.  
<http://www.gene.ch/gentech/1999/Dec/msg00177.html> (12.09.2006)



- Third World Network: *How low can you go?*  
<http://www.twinside.org.sg/title/twe287d.htm> (12.08.2006)
- Third World Network (2001): *Patents and Medicines: The WTO Must Act Now!* Joint NGO Statement on the Special Discussion in the WTO TRIPS Council on Patents and Access to Affordable Medicines.  
<http://www.twinside.org.sg/title/joint4.htm>
- Tufts University (2006): *Comment by Mr. Lamy.*  
<http://fletcher.tufts.edu/news/2006/11/lamy.shtml> (11.25.2006)
- U.S. Trade Representative (2001): *USTR Fact Sheet Summarizing Results from WTO Doha Meeting.* November 15, 2001  
[www.usembassy.it/file2001\\_11/alia/a1111516.htm](http://www.usembassy.it/file2001_11/alia/a1111516.htm) (11.05.2006)
- UNCTAD (2002): *UN recognition of the LDCs.*  
<http://www.unctad.org/Templates/Page.asp?intItemID=3618&lang=1> (11.19.2006)
- UNCTAD (2005): *Lessons of Experience: Trade and Development Board Hears that One-Size-Fits-All Approach Doesn't Work.* UNCTAD/PRESS/PR/2005/043  
<http://www.unctad.org/TEMPLATES/webflyer.asp?docid=6440&intItemID=1634&lang=1> (01.04.2006)
- UNCTAD (2006): *UN list of LDCs after the 2003 triennial review.*  
<http://www.unctad.org/Templates/Page.asp?intItemID=3641&lang=1> (11.19.2006)
- UNCTAD: *UN list of LDCs after the 2003 triennial review.*  
<http://www.unctad.org/Templates/Page.asp?intItemID=3641&lang=1> (11.19.2006)
- UNCTAD: *UN recognition of the LDCs.*  
<http://www.unctad.org/Templates/Page.asp?intItemID=3618&lang=1> (11.19.2006)
- WHO (2001): *Statement by the World Health Organization on the Outcome of the World Trade Organization's Doha Ministerial Conference 2001.* WHO/18, November 15, 2001, <http://www.who.int/inf-pr-2001/en/state2001-18.html> (11.02.2006)
- WHO (2002): *Scaling up the Response to Infectious Diseases: A Way Out of Poverty.*  
<http://www.who.int/infectious-disease-report/2002>
- WHO (2006): *Counterfeit medicines.* Fact-sheet No. 275  
<http://www.who.int/mediacentre/factsheets/fs275/en/> (11.02.2006)

- Wikipedia (2006): *Consensus decision-making*.  
[http://en.wikipedia.org/wiki/Consensus\\_decision-making](http://en.wikipedia.org/wiki/Consensus_decision-making) (11.16.2006)
- Wikipedia (2006): *Generic drug*.  
[http://en.wikipedia.org/wiki/Generic\\_medicine](http://en.wikipedia.org/wiki/Generic_medicine) (11.01.2006, 15.14)
- Wikipedia (2006): *Generic drugs*.  
[http://en.wikipedia.org/wiki/Generic\\_medicine](http://en.wikipedia.org/wiki/Generic_medicine) (11.01.2006, 15.14)
- Wikipedia (2006): *Intellectual property*.  
[http://en.wikipedia.org/wiki/Intellectual\\_property](http://en.wikipedia.org/wiki/Intellectual_property) (11.08.2006)
- Wikipedia (2006): *International Court of Justice*.  
[http://en.wikipedia.org/wiki/International\\_court\\_of\\_justice](http://en.wikipedia.org/wiki/International_court_of_justice) (12.11.2006)
- Wikipedia (2006): *Legitimacy*.  
[http://en.wikipedia.org/wiki/Legitimacy\\_%28political\\_science%29](http://en.wikipedia.org/wiki/Legitimacy_%28political_science%29) (12.09.2006)  
[http://en.wikipedia.org/wiki/Consensus\\_decision-making](http://en.wikipedia.org/wiki/Consensus_decision-making) (11.16.2006)
- Wikipedia (2006): *Sources of International Law*.  
[http://en.wikipedia.org/wiki/Sources\\_of\\_international\\_law](http://en.wikipedia.org/wiki/Sources_of_international_law) (11.26.2006)
- Wikipedia (2006): *The World Bank*.  
[http://en.wikipedia.org/wiki/World\\_bank](http://en.wikipedia.org/wiki/World_bank) (11.25.2006)
- Wikipedia (2006): *Transparency*.
- Wikipedia: *Consensus decision-making*.
- Wikipedia: *Democracy*.  
<http://en.wikipedia.org/wiki/Democracy> (12.09.2006)
- Wikipedia: *Parallel import*.  
[http://en.wikipedia.org/wiki/Parallel\\_import](http://en.wikipedia.org/wiki/Parallel_import) (11.02.2006)
- WorldBank (2006): *About Us*.  
<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> (12.15.2006)

## WTO Documents

- WTO Document IDA/8: *Termination of the International Dairy Agreement - Decision Pursuant to Article VIII.3*. September 30, 1997
- WTO Document IMA/8: *Termination of the International Bovine Meat Agreement - Decision Pursuant to Article VI.3*. September 30, 1997
- WTO Document IP/C/25: *Extension of the transition period under Article 66.1 of the TRIPS Agreement for least-developed country Members for certain obligations with respect to pharmaceutical products*. July 1, 2002
- WTO Document IP/C/40: *Extension of the Transition Period under Article 66.1 for Least-Developed Country Members for TRIPS of 29 November 2005*. November 30, 2005
- WTO Document IP/C/41: *Implementation of paragraph 11 of the General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*. December 6, 2005
- WTO Document IP/C/M/33: *Council for Trade-Related Aspects of Intellectual Property Rights - Minutes of Meeting - Held in the Centre William Rappard on 19 and 20 September 2001*. November 2, 2001
- WTO Document IP/C/M/38: *Council for Trade-Related Aspects of Intellectual Property Rights - Minutes of Meeting - Held in the Centre William Rappard on 25 - 27 and 29 November, and 20 December 2002*. February 5, 2003
- WTO Document IP/C/M/39: *Council for Trade-Related Aspects of Intellectual Property Rights - Minutes of Meeting - Held in the Centre William Rappard on 18 - 19 February 2003*. March 21, 2003
- WTO Document IP/C/W/405: *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health - Draft Decision of [...] 2003*. August 28, 2003
- WTO Document JOB(02)/217: *Implementation of paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health*. December 16, 2002
- WTO Document MIN(86)/W/19/Corr.1: *Punta del Este - Uruguay - 15-20 September 1986 - Draft Ministerial Declaration on the Uruguay Round*. September 20, 1986
- WTO Document MIN.DEC/Chair: *Ministerial Declaration on the Uruguay Round*. September 20, 1986

- WTO Document PRESS/131: *WTO member governments agree on Director-General succession*. July 22, 1999
- WTO Document Press/345: *WTO Director-General Establishes a Consultative Board on the Future of the Multilateral Trading System*. June 19, 2003
- WTO Document press/350: *Decision Removes Final Patent Obstacle to Cheap Drug Imports*. August 30, 2003
- WTO Document Press/426: *Intellectual Property - Members ok Amendment to Make Health Flexibility Permanent*. December 6, 2005
- WTO Document TN/C/W/1: *Trade Negotiations Committee - Proposed Agenda - Meeting of 28 January 2002*. January 24, 2002
- WTO Document WT/DS114: *Canada – Patent Protection of Pharmaceutical Products*. March 17, 2000
- WTO Document WT/GC/M/82: *General Council - Minutes of Meeting - Held in the Centre William Rappard on 25, 26 and 30 August 2003*. November 13, 2003
- WTO Document WT/GC/W/464/Rev.1: *General Council - Procedures for the Circulation and Derestriction of WTO Documents - Draft Decision - Revision*. May 6, 2002
- WTO Document WT/L/160/Rev.1: *Procedures for the Circulation and Derestriction of WTO Documents - Decision adopted by the General Council on 18 July 1996 - Revision*. July 26, 1996
- WTO Document WT/MIN(05)/DEC: *Hong Kong Ministerial Declaration*. December 22, 2005
- WTO Document WT/L/161: *Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council*. July 25, 1996
- WTO Document WT/L/162: *Guidelines for Arrangements on Relations with Non-Governmental Organizations - Decision adopted by the General Council on 18 July 1996*. July 18, 1996
- WTO Document WT/L/540: *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health - Decision of 30 August 2003*. September 2, 2003

- WTO Document WT/L/579: *Doha Work Programme - Decision Adopted by the General Council on 1 August 2004*. August 2, 2004
- WTO Document WT/L/641: *General Council - Amendment of the TRIPS Agreement - Decision of 6 December 2005*. December 6, 2005
- WTO Document WT/L/93: *Decision-Making Procedures under Articles IX and XII of the WTO Agreement, As Agreed by the General Council on November 15, 1995*. November 24, 1995
- WTO Document WT/L/304: *Preferential Tariff Treatment for Least-Developed Countries*. June 15, 1999
- WTO Document WT/MIN(01)/DEC/2: *Ministerial Conference, Fourth Session, Doha, November 9-14, 2001, Declaration on the TRIPs Agreement and Public Health*. November 20, 2001
- WTO Document WT/MIN(96)/DEC: *Ministerial Conference, Singapore - Singapore Ministerial Declaration - Adopted on 13 December 1996*. December 13, 1996
- WTO Document WT/TPR/6/Rev.1: *Rules of Procedure for Meetings of the Trade Policy Review Body*. October 10, 2005

### **WTO Agreements**

- Agreement Establishing the World Trade Organization
- Agreement on Agriculture
- Agreement on Government Procurement
- Agreement on Trade in Civil Aircraft
- Dispute Settlement Understanding
- General Agreement on Tariffs and Trade 1947
- General Agreement on Tariffs and Trade 1994
- General Agreement on Trade in Services
- International Bovine Meat Agreement
- International Dairy Agreement
- Trade Policy Review Mechanism
- Trade-Related Aspects of Intellectual Property Rights

## WTO Web

- WTO (1999): *WTO “Geneva Week” for non-resident delegations.*  
[http://www.wto.org/french/tratop\\_f/devel\\_f/genwk1\\_f.htm](http://www.wto.org/french/tratop_f/devel_f/genwk1_f.htm) (10.07.2006)
- WTO (2002): *The Doha Development Agenda and Beyond: Functioning and Financing of the WTO.*  
[http://www.wto.org/English/tratop\\_e/dda\\_e/summary\\_report\\_funcf\\_financ.doc](http://www.wto.org/English/tratop_e/dda_e/summary_report_funcf_financ.doc)  
(12.17.2006)
- WTO: *Trade liberalisation statistics.*  
[http://www.gatt.org/trastat\\_e.html](http://www.gatt.org/trastat_e.html) (11.07.2006)
- WTO (2003): *Cover letter of the draft Cancún Ministerial text.*  
[http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/draft\\_decl\\_covletter\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_covletter_e.htm)  
(12.17.2006)
- WTO (2003): *Day 5: Conference ends with consensus.*  
[http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/min03\\_14sept\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm)  
(12.17.2006)
- WTO: *Who are the developing countries in the WTO?*  
[http://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm)
- WTO (2003): *Decision removes final patent obstacle to cheap drug import.* Press Release (Press/350/Rev.1) August 30, 2003  
[http://www.wto.org/english/news\\_e/pres03\\_e/pr350\\_e.htm](http://www.wto.org/english/news_e/pres03_e/pr350_e.htm) (11.06.2006)
- WTO (2003): *Draft Cancún Ministerial Text.*  
[http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/draft\\_decl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_e.htm) (12.17.2006)
- WTO (2004): *International Business Conference on Global Economic Governance & Challenges of Multilateralism.* January 17, 2004  
[www.wto.org/English/news\\_e/spsp\\_e/spsp21\\_e.htm](http://www.wto.org/English/news_e/spsp_e/spsp21_e.htm) (11.14.2006)
- WTO (2005): *Chairperson’s statement, December 2005.* December 6, 2005  
[http://www.wto.org/english/news\\_e/news05\\_e/trips\\_319\\_e.htm](http://www.wto.org/english/news_e/news05_e/trips_319_e.htm)
- WTO (2005): *NGOs eligible to attend the Sixth WTO Ministerial Conference, to be held in Hong Kong, China, from 13 to 18 December 2005.*  
[http://www.wto.org/english/thewto\\_e/minist\\_e/min05\\_e/list\\_ngo\\_e.pdf](http://www.wto.org/english/thewto_e/minist_e/min05_e/list_ngo_e.pdf) (12.17.2006)

- WTO (2005): *Understanding the WTO: Members and Observers*.  
[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (11.14.2006)
- WTO (2005): *Whose WTO is it anyway?*  
[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm) (11.30.2006)
- WTO (2006): *Countries accepting amendment of the TRIPS Agreement*.  
[http://www.wto.org/english/tratop\\_e/trips\\_e/amendment\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm) (01.04.2007)
- WTO (2006): *General Council supports suspension of trade talks, Task Force submits "Aid for Trade" recommendations*. The General Council meeting, July 27-28, 2006  
[http://www.wto.org/English/news\\_e/news06\\_e/gc\\_27july06\\_e.htm](http://www.wto.org/English/news_e/news06_e/gc_27july06_e.htm) (11.21.2006)
- WTO (2006): *June / July 2006 modalities meetings*.  
[http://www.wto.org/English/tratop\\_e/dda\\_e/modalities06\\_e.htm](http://www.wto.org/English/tratop_e/dda_e/modalities06_e.htm) (12.03.2006)
- WTO (2006): *Ministerial Conferences*.  
[http://www.wto.org/english/thewto\\_e/minist\\_e/minist\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/minist_e.htm) (11.16.2006)
- WTO (2006): *TRIPS and pharmaceutical patents*. Fact sheet.  
[http://www.wto.org/english/tratop\\_e/trips\\_e/tripsfactsheet\\_pharma\\_2006\\_e.pdf](http://www.wto.org/english/tratop_e/trips_e/tripsfactsheet_pharma_2006_e.pdf)  
(10.31.2006)
- WTO: *How the negotiations are organized*.  
[http://www.wto.org/english/tratop\\_e/dda\\_e/work\\_organ\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm) (12.12.2006)
- WTO: *Overview: the TRIPS Agreement*.  
[http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm) (11.01.2006)
- WTO: *Trade facilitation technical assistance and capacity building*.  
[http://www.wto.org/English/tratop\\_e/tradfa\\_e/ta\\_capac\\_build\\_negoti\\_e.htm](http://www.wto.org/English/tratop_e/tradfa_e/ta_capac_build_negoti_e.htm)  
(01.10.2006)
- WTO: *What is the WTO?*  
[http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) (01.04.2007)